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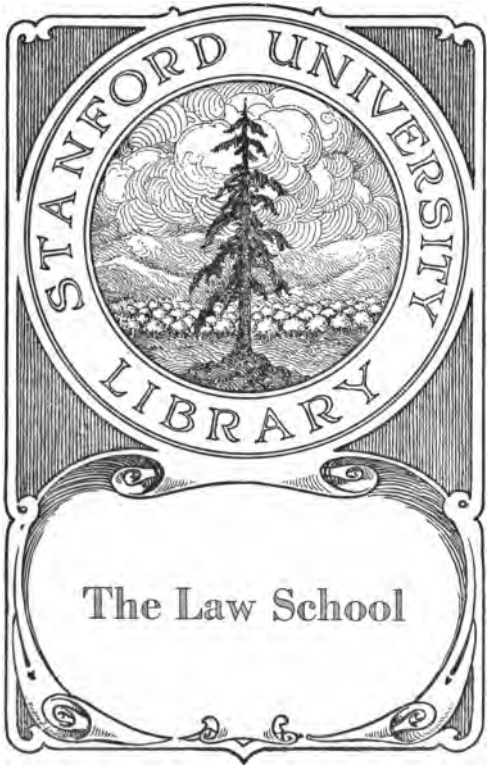
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The Man in Court

By

Frederic DeWitt Wells

Justice, Municipal Court of New York City

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To

MY FRIEND

CHARLES E. GOSTENHOFER

OF THE NEW YORK BAR

IN ACKNOWLEDGMENT OF HIS AID AND SUGGESTIONS

THIS BOOK IS DEDICATED

INTRODUCTION

THE author has tried to show the point of view of the ordinary man in a law court, as the various proceedings of a trial take shape before him. To the initiated, the whole book may seem too obvious; but it has not been written for them, but for those to whom these proceedings are unfamiliar. There are many who have a certain curiosity about the courts, and at the same time a real respect for justice, mingled with amusement at the panoplies and antiquated forms of legal procedure.

F. DEW. W.

NEW YORK,
January, 1917.

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I

A NIGHT COURT

I

A NIGHT COURT

IN the Night Court the drama is vital and throbbing. As the saddest object to contemplate is a play where the essentials are wrong, so in this court the fundamentals of the law are the cause of making it an uncomfortable and pathetic spectacle.

The women who are brought before the Night Court are not heroines, but the criminal law does not seem better than they. It makes little attempt to mitigate any of the wretchedness that it judges; in many cases it moves only to inflict an additional burden of suffering. The result is tragedy.

The magistrate sits high, between standards of brass lamps. His black gown, the metal buttons and gleaming shields of the

waiting police officers, the busy court officials behind the long desks on either hand tell of the majesty of the law.

In front of the desk but at a lower level is a space of ten or twelve feet running across the court-room in which are patrolmen, plain-clothes men, detectives, women prisoners, probation officers, reporters, witnesses, investigators, and lawyers. Beyond in the court-room a large crowd is on the benches. There are witnesses, brothers and sisters, friends of the prisoners waiting to see whether they go out through the street entrance or back through the strong barred gate seen through the door on the left. Also there are the "sharks" waiting to follow out the released prisoners, to prey upon them as the circumstances may favor; and a number of curiosity seekers watching intently. For them it can be nothing but a morbid dumb show, for they are so far from the bench that not a word of the proceedings could be heard. Only once in a while the shrieks and imprecations of a struggling hysterical woman as

she is hurried out of court can enliven the scene.

Fortified with a letter of introduction to the judge and a disposition that will not be too easily shocked at seeing conditions of life as they actually exist, the spectator may find his way past the policeman at the gate in the rail. It clicks behind him ominously and he wonders whether he will have difficulty in getting out. Finally through clerks and officials who become more kindly as they learn he is a friend of the judge, he is seated in a chair drawn up beside the bench. The magistrate is a hearty round-faced man who seems almost human in spite of his gown and the dignity of his surroundings. The court looks different from this point of view and he may easily watch the judicial enforcement of the law supreme.

The organization of these courts is simple. There are not many rules or technicalities. The judges are patient, hard working, understanding, and efficient. The trouble is with the laws they are called upon to

administer: Laws which are as absurd, as farcical, and as impracticable as the plot of the lightest musical comedy.

At first the visitor can hardly understand what is going on. A pale-faced man is in the witness chair, on his left a bedraggled little woman is standing before and below the judge, her eyes just level with the top of the desk. Clerks are coming with papers to be signed: "commitments," "adjournments," "bail bonds"; others are trying to engage his attention. In the meanwhile the case proceeds.

"I inform you," says the judge to the woman, "of your legal rights, you may retain counsel if you desire to do so and your case will be adjourned so that you may advise with him and secure witnesses, or you may now proceed to trial. Which will you do?"

She murmurs something. She is pale-faced with sullen eyes, drooping mouth, an over-hanging lip. A sad red feather droops in her hat

"Proceed," says the judge; and to the

policeman who is called as a witness, "You swear to tell the truth, the whole truth mm-mm-mm—you are a plain-clothes man attached to the 16th Precinct detailed by the central office, what about this woman?"

"At the corner of Fifteenth Street and Irving Place," says the witness, "beween the hours of 10:05 and 10:15 this evening I watched this woman stop and speak to three different men. I know her, she has been here before your Honor."

"What do you say?" the judge asks the woman. She is silent.

"What do you work at?"

"Housework, your Honor."

"Always housework; it is surprising how many houseworkers come before me." She smiles a sickly smile.

"Take her record. Next case," says the judge. Outside it is a cold sleeting night in early March.

"Witnesses in case of Nellie Farrel," calls the clerk.

Nellie Farrel stands before the desk beside

a policeman; she is tall with fair waving hair. She must have been pretty once; even now there is a delicate line of throat and chin. But her eyes are hard and on her cheeks there are traces of paint that has been hastily rubbed off. She looks thirty; she is probably not more than twenty.

A callow youth, who seems preternaturally keen, swears that on Thirteenth Street between Fifth Avenue and University Place the woman stopped and spoke to him; and he tells his story as though it were learned by rote.

"Do you know the officer who made the arrest?" the judge asks him.

"I do." A suspicion arises that there may be an interest between the witness and the policeman.

A dark-haired, smooth-faced woman who is standing by the prisoner says: "Your Honor, she's my sister. I'm a respectable woman, my husband is a driver. I have three children. It's disgrace enough to have the likes of her in the family. If you'll give her another

chance I'll take her home with me; my husband is here and he's willing." The accused looks down piteously.

"Discharged on probation," says the judge, and the family go out.

"That's the third time that's happened to her," whispers a clerk. "Every time the sister comes up like a good one."

A horrible old woman with straggling gray hair, shrivelled neck, and claw-like hands grasps a black shawl about her flat chest. "Mary," says the judge, "thirty days on the island for you."

"Oh, your Honor, your Honor, not the workhouse. Oh, God, not the workhouse," and she is borne out screaming and fighting and invoking Christ to her aid. The judge turns and says in explanation, "an old case, an example of what they all may come to."

A dark-haired little French woman is brought in with crimson lips, bold black eyes, and expressive hands. A detective testifies that he went with her into a tenement house on Seventeenth Street west of

Sixth Avenue. Charge: Violation of the Tenement House Law.

"Qu'importe," says the woman. "I go in ze street. I am arrested. I stay in ze house. I am arrested. I take ze room. I am arrested. Chantage—Blackmail. C'est pour rire."

Who are these women who are brought in a crowd together? One of them older than the rest is a foreigner plainly dressed in black silk with a gold chain. She does not seem particularly evil, but rather respectable. The others are in long cloaks or waterproofs hastily donned and through which are glimpses of pink stockings. They have hair of that disagreeable butter color which speaks of peroxide. There has been a raid on a west-side street of a house of ill repute. Some testimony is given and the older woman, the "Madam" is held in bail for the action of the Grand Jury while the rest are held for further evidence. The judge tells us there will probably not be enough testimony and they will be released in the morning.

But unless bail is found they will spend the night in cells.

A nervous, excited woman comes in—two policemen are with her. She has been arrested for disorderly conduct on Sixth Avenue near Thirty-first Street. She has been fighting with a man who has also been arrested and taken to the men's Night Court. Hers is a hard, tough face of the lowest type.

"Why should you try to scratch the man's face? What did he do?" the judge asks. "Is he your husband?"

"My husband, your Honor? Yes, I guess you can call Al that. We lives up town and when I went out he says to me, 'Hustle, kid, you got to hustle, the rent's due and if you don't get the money I'll break your neck.' The slob won't work. Well, a night like this you couldn't make a cent and I only had half a dollar and I wanted to get a bite to eat. I hadn't had a thing since four o'clock, and then I met Al going down Sixt' Avenue an' he tries to swipe me fifty cents off me and I was that wild I wanted to tear

him. I'm sorry; I guess it was my fault. I don't want to see him jugged, so please let me off, your Honor, and I won't make no trouble."

"Take her record," said the judge, "and hold her as a witness against the man."

A string of women are brought in for sentence who have been having finger prints taken in the adjoining room. The judge proceeds to impose sentences according to the previous records which are shown. Some of the women are those who have passed in front before. The little bedraggled woman with the red feather has been arrested seven times in sixteen months. Another has spent eight weeks in the workhouse out of a period of seven months; another has been sent already to the Bedford Reformatory; another has been twice to houses of reform. Before the judge gives his sentence he refers the prisoners to the probation officer, who talks with them in a motherly way.

After talking with the little prisoner she addresses the judge. "She says its no use,

your Honor, she does not want to reform—it will not be worth while to put her on probation."

"Committed to the Mary Magdalene Home," says the judge, and the name brings a startling surmise as to what He of Galilee would have said.

The foregoing is only a typical session of the court. Night after night, from eight o'clock until one in the morning, the scene is repeated. The moral effect and its reaction upon those who conduct the proceedings—the judges, officers, and the police, cannot but be deplorable; the evil done to those forcibly brought there could not be over-estimated.

Substantially the law is that the women may not loiter in the streets nor solicit in the streets, or in any building open to the public. They may live neither in a tenement house nor in a disreputable house. The law makes it a crime for the women to walk abroad or stay at home. Their existence is not a crime, but only in an indirect way the law makes them outlaws. Anyone wishing to prosecute

or persecute finds it easy to do so. The worst enemies of these unhappy women are to be found, curiously enough, among both the best and the most evil people in the community. The unspeakably depraved are the men who, either as procurers, blackmailers, or the miserable men who live on a share of their earnings. The excellent people who oppose any remedial legislation which might relieve the situation, seem equally responsible for the present condition, however well-intentioned they may be.

One effect of the present system is the practically unchecked transmission of disease. A reform in this direction would not solve the basic problem, for there would remain full opportunities of blackmail and extortion, but it might still remove a menace to the health of the community which is probably more serious than tuberculosis.

A statute to this end was enacted in New York State a few years ago: an act for the medical examination of the women. It was declared unconstitutional because of one

word. It should have read, "the judge may"; instead, it read, "the judge *must.*" Far more difficult to deal with is the opposition of the people who believe that the moral sense of the community would be jeopardized by any laws suggesting that prostitution is unavoidable.

In ironic contrast to the failure of legislation to prevent the spread of disease, is the success of an ill-advised statute making adultery a crime. Under it, a married man having relations with a prostitute and the woman herself, are subject to criminal prosecution. It affords a fresh field for extortion, how largely used it is impossible to say.

The history of the passage of the adultery act presents one of the most ghastly jokes ever perpetrated by a State Legislature.

For years such a bill had been introduced in the New York Legislature and had been passed by either the Assembly or the Senate without comment and then quietly killed in the other house. It was obvious that such a law could not be properly enforced and its

blackmailing possibilities were manifest, yet no one, not even Governor Hughes, who was then in office, could be openly opposed to its passage.

The tender morality of the community would not allow a public discussion.

It was said, at the time, that when the representative of a society for the suppression of vice called on one member asking him to introduce the bill, he declined to do so on the ground that he represented a Fifth Avenue District and it would make him too unpopular among his constituents. When the bill had been introduced by another member and came up for final passage, it was decided, since Governor Hughes had vetoed many political bills of members of both houses, to put him in a dilemma. If the bill were presented to him he would have to sign an absurd statute or declare himself the friend of unrighteousness. He signed it and the bill became a law. Since its enactment there have been ridiculously few convictions under it.

The successive carelessness, timidity, and

levity of the Legislature is depressing, but there is an encouraging increase of interest on the part of the public. The average man is not merely interested in the problem; he appears to take the sensible view that the "social evil" is not so much a moral question as a condition, a problem to be met like other problems. We have become less concerned with the private morals of our fellow citizens than with their health, safety, and the prevention of unnecessary suffering. We perceive that the courts are only our agents and are not directly responsible for what they do; they are following instructions given by our ancestors and which we have neglected to abolish or modify.

The visitor leaves the Night Court with a strange sense of having his social values overthrown. He feels almost sympathetic with the women whom he has seen. They may be offenders against morals and the social order, but they are human beings over whom the waters of civilization seem to sweep with relentless flood.. The frightful waste of life

and energy seems inexcusable. And it is as though some mill dam had burst and was flowing in a terrific torrent down a river bed along which a few are drawn white and drowned.

The ordinary man knows that the women who go under are such a small proportion of those who escape, that it seems either a ghastly joke or a terrible tragedy. The whole paraphernalia of the court-room merely accents the contrast between those who are caught and those who go free.

But all criminal courts are always unpleasant. And humanity if seen only in the setting of a criminal trial would be a discouraging object. Turning to the more civil court, we find an almost equal unfitness between the courts and modern conditions.

II

THE CIVIL COURT

II

THE CIVIL COURT

IN a twenty-four-story office building, on a smooth gliding elevator, up seventeen stories, down a low-ceilinged corridor, past fireproof doors labeled: "Clerk's Office," "Judge's Chambers," "Witness Room," we find the typical modern court. The old idea of a very psuedo-classic courthouse on a placid village green to which the neighboring county squires have ridden, and where the jail is in the cellar and the town recorder in the attic, is fast disappearing. The old courthouse in the city, of red sandstone with battlements and turrets, minarets, and a clock tower, seems out of date.

The white marble palaces of the higher courts wherein broad stairways, paneled

mahogany, stained glass, and soft noiseless carpets giving an air of repose and refined culture, are not altogether consistent with the modern spirit. The man on the street does not understand whether the marble statues on the roof are symbols of justice or late presidents of the United States. The usual courthouse of twenty years ago was a mixture of armory and Gothic church.

In the larger courthouses where there are many terms or parts in one building, there is an air of confusion. Rotundas, corridors, stairways, and elevators are constantly filled with a moving crowd of lawyers waiting for their cases to be tried, clients who have had appointments, witnesses who have been subpœnaed to come to court and when they get there find it is not one court, but thirty. The latter are found wandering dazedly about asking anyone who will stop to listen if they know in which part the case of Martin *vs.* Martin is being tried. Lunch counters, telephone booths, and a feeling of awe are in the building.

What that terror of a court of law comes from is difficult to analyze. There is the impressive majesty of the law; always about a court is the inspiring sense of something more than human. Even an empty court-room is not as other rooms. Like an empty theater there remains an atmosphere of glamour, of mystery, and yet equally true there remains a substantial, strong odor of crowds.

It is said that every theater retains its own peculiar smell. The scientific investigation of the psychology of odors is too subtle to be understandable. The question of analyzing the exudations of a nervous crowd seems interesting, but the remembrance of an anxious humanity is always present. In former times the attendant placed a small bunch of herbs and aromatic flowers on the judge's desk, and glasses of the dried bouquets remained in a row for long periods.

Hygienically considered the courts are unsanitary. If the windows are opened the cold air is apt to draw directly on the heads

of the jury and the stenographer. In summer the noise of city streets, the cars, the elevated, the cries of children, the hand-organs, the flies, are not at all conformable to the supposed dignity of the court. It is well-known that the crowded and unhealthy conditions of the courts are conducive to disease as well as discomfort to the inhabitants.

The connotations of the name court are generally impressive. There is the suggestion of jail, of punishment, of something final, of absolute judgment. Also it suggests the courtyard of a tenement house, an alley-way or something shut in and confined. The philology is from the old French cort or curt. It is curious that it means something narrow. There are the suggestions of the lists, of heralds, of trumpets, of banners and knights in armor, of prancing steeds, of fair ladies watching, of joust, tournaments, and trials by battle. There is something royal about the word. We think of pomp and magnificence and purple robes, of kings on their thrones, with courtiers standing about. The con-

ception of Diety to the simple man who visualizes, immediately takes on the form of a court. We speak of the Courts of Heaven. The pictures of Godhead represent him as sitting in the center on his raised throne with the surrounding tiers of attendant angels.

The modern court-room is only an adapted continuation of a medieval idea. On the raised dais under an unsanitary and dusty canopy of green plush sits the judge; instead of a sceptre he holds the gavel. This gavel, by the way, is falling more and more into disuse. As a symbol of authority, a little wooden hammer has become a trifle ludicrous. If a judge were to shake it too violently there might be a fear on the part of those watching that he was about to throw it at the spectators or at one of the arguing lawyers.

The judge sits at an imposing high-railed desk with standard lights at either corner. The top of the desk is usually above the level of the eyes even of the lawyer standing. This is an arrangement which is con-

ventional and convenient; it would not be consistent with the majesty of the law if the judge should be discovered writing a personal note or taking a glance at the stock market reports in the evening paper.

The judge's chair is ordinarily a revolving one with a dip backward. Stationary chairs are trying, for those who have to remain quiet for so many hours at a time, and the swinging back and forth and twisting about gives a little relaxation.

In front of the judge's dais are the counselors' or lawyers' tables, and at one side in front and below usually another table for reporters. It is somewhat like the arrangement in baronial halls where there was an upper and lower table and some sat below the salt and others above.

On one side, opposite, but not as high, is the jury-box. This is a pen with twelve seats within a high-sided inclosure like an old-fashioned pew. What the object of the inclosure may be is uncertain, unless it is a relic of a time when it was necessary to

imprison the jurors. Jury duty has doubtless always been arduous and disagreeable, and in earlier days men were probably as anxious to escape serving on the jury as they are to-day. In one of the courts, which was not supposed to be for jury trials, twelve men once sat on a case without any jury-box in plain chairs and at the side of the room. They were extremely uncomfortable themselves; their legs were exposed and they seemed shockingly unconventional.

Between the judge's desk and the jury-box is the witness chair, an ordinary chair placed not quite so high, but beside the judge's and where he can look down on the witness. The position of the witness chair may be accountable for the feeling of protecting the witness that exists in the minds of the judge and jury. There is a natural sympathy for him, as though he were being attacked by the examining counsel. The witness in former times stood in a little enclosed box and in Italy, where court scenes are more intense, the prisoners to this

day in criminal trials testify from behind iron bars.

Below the witness chair is the stenographer. The former idea of the aged scrivener or court clerk with white hair and green eye shade has vanished. The modern stenographer, who keeps the record of a trial, is probably an energetic young man, who has passed high on the civil service list, knows something about law, is studying for a better position, or is connected with a very profitable stenographers' business on the outside.

The court proper is divided from the rest of the room by an iron or wooden rail guarded by a jealous court attendant, who is always a strong advocate of court etiquette and very properly maintains the dignity of the court. He is in uniform with a shield or badge of office conspicuously displayed and being taken from the civil service list whereon war veterans and retired firemen or policemen have a preference, is generally of a certain age. Naturally, being old and having to stand so much, he has tender feet, and with

the customary effects of all secure and salaried positions, acquires both a slow and shuffling gait and the ordinary characteristics of his class. He is subject to many petty annoyances, foolish questions, repeated inquiries, people talking or arguing, little disorders pursue him on every hand.

The object of the attendant in the court is to maintain order and preserve dignity. They are almost avid in their pursuit of the ignoramus who comes in with his hat on his head or covers himself on going out before he reaches the door. Their salaries are not large but their duties are not arduous. They may seem solicitous to the judge and sometimes overbearing to the litigants and lawyers, but they are only in the position of the supes or ushers in the theater. Yet they are understanding and wise as regards the human drama constantly played before them.

The lighting of the court-room is unusually dramatic. There are no foot-lights, but the best theory of stage lighting is that there should be none. One of the most effective

scenes in the modern theater is the court setting in Galsworthy's *Justice*. The lighting is indirect and the spots of red and green lights at the judge's desk, the corners of the jury-box and the shaded ones at the clerk's elbow, give a remarkable impression of mysterious terror.

Whatever may be the cause, there exists a marked resentment against the courts. Not only is there a complaint as to the cloying technicalities of procedure, the long and fatal delays of the law, the absurd forms and mannerisms of the trial, but underneath them all a fundamental distrust of justice itself. The complaint is heard of the inequality of justice. That there is a law for the poor man and another law for the rich. The stage gives expression to the feeling, and modern literature voices it. The high-priced millionaire escapes and the low-browed pickpocket goes to prison.

Cases are cited where the rich woman returning from a debauch of European shopping with a few thousand dollars' worth

of pearls sewed in the lining of her winter bonnet is only fined, whereas the little milliner from the lower end of the city is sent to jail for trying to smuggle in a new coat. The impressario of art collections is caught at a gigantic scheme for defrauding the government of thousands of dollars on imported pictures. He hobbles into court and on the ground of ill health escapes a prison sentence and is merely fined, while the little Italian fruit vender is summarily jailed for bringing in a few dried mushrooms. The high financier who wrecks a railroad or a bank serves a light prison term and emerges like a phœnix to buy new steamboat lines or float new enterprises. But the peddler on the East Side who sells a few dollars' worth of stale fish is punished to the limit of the law.

The facts exist and to the popular mind seem unexplainable. There undoubtedly must be a reason, and what it is, is not hard to find. It seems one of the mysteries of judging and of justice, as though there were an unwritten law in the back of the

human mind in favor of property rights. There is an explanation and not an inequality of justice. The facts are not as they are popularly stated or supposed to be. The public gets only a portion of the picture, and from an enormous group of cases, a few contrasted ones are picked out for the sake of the dramatic effect. The limelight of public notice is upon them and the softer lights and shadows are omitted. The public does not see the gradation. On the one hand we see the rich woman, the millionaire art dealer, the financial pirate being leniently dealt with, on the other hand we see the little milliner, the Italian fruit vender, and the peddler receiving harsh sentences

The sharp contrasts make good newspaper stories that are appealing and touching. What the public does not see is the whole picture of all the cases of alleged inequality that come into court. These are only six out of seven hundred cases, chosen because they are melodramatic. There were nearly seven hundred other offenders that were let off with

suspended sentences or light fines, of whom nothing is heard, but these three are conspicuous on account of their wealth, and the cases of the milliner, the mushroom vender, and the peddler are reported for the same reason—of being conspicuous. They are unusual on account of the sentences. The harshness of their sentences is remarkable. There may be special reasons. The six hundred and ninety-odd who are punished lightly in the same way as the rich man are not noticed.

As a matter of actual experience, the rich man has a harder time in court than the poor man. The inequality of justice, if there be any, is rather against him. Because he is rich and notorious the public prosecutor cannot let him off. If, for example, a poor man who is undoubtedly insane, commits a murder he is not tried, but is sent to an asylum for the insane. If, after several years, he recovers and is released, nothing is said about it; the public does not know. But let it be a rich lunatic and the public prosecutor

is bound to bring him to trial. Public attention demands it. He may know him to be insane, but he must still prosecute him. The jury declare him insane. After years he is released from the asylum, the public thinks it a miscarriage of justice, forgetting in the meanwhile the inconspicuous poor man who unnoticed has gone through the same experience, and been released years ago.

The delays of the law are partly due to the system of courts and partly to the dullness of court procedure. The inefficiency of the system of courts and judicial procedure is shown in the practical workings of the civil courts of New York City. The antiquated organization of all the courts is like a patchwork quilt where each additional one has been added or increased as New York has grown from a village below the Indian stockade at Wall Street to its present size. So that there exist within the city limits now seven different kinds of civil courts and five kinds of criminal courts, in nearly each of which there is a

separate set of rules, different customs, and distinct methods of procedure, and of them all the most technical and the most complicated are often those where they should be the most simple and easy of understanding.

Wherever the court may be the surroundings are substantially the same. The scene is laid and the carpenters have left. The spectators have found their places. The stage is empty however, there is a sudden bustle and shifting of feet, a rumor has gone abroad that something is about to happen. The court attendants take their places. One of them straightens up and with a commanding voice cries out: "Gentlemen, please rise. Hear ye, hear ye, all persons having business draw near and ye shall be heard." Enter his Honor, the Judge.

III

THE JUDGE

III

THE JUDGE

WITH a rustle of his gown and a bow to the court-room the judge takes his seat on the bench. The trivial pleasures of being heralded and having the spectators rise when he enters have lost their charm, but he would feel uncomfortable without them. The gray-haired clerk hands him the list of the cases for the day. The anxious court attendant asks if he shall open a window. The judge sniffs audibly and orders the steam heat to be turned off. The court attendant does so and brings his Honor a glass of water. When the judge sits down in the revolving chair he is on the bench and the court is in session.

The fact of the matter is the judge is a pretty decent sort of person. The trouble is

that the surroundings are all against him. In the first place his whole job is one that makes him live up to a part. For five or six hours a day he has to sit still in a stuffy court-room on a leather chair under a silly canopy of wood or plush and pretend that he is the whole thing, that he knows it all, and that whatever he decides is absolutely right. Let him waiver or be uncertain in his decisions and woe is it to him. No one thinks much of a judge who does not know his business or at least does not pretend to know it.

How anyone who has been long on the bench can retain any sense of proportion is remarkable. Whatever he says and does in court is final and apparently approved. If his decisions are reversed they do not affect him seriously; he has tried so many cases that were not appealed, and the greater proportion of those that have been are affirmed. The reversal comes a long time after and does not hurt his feelings. In any event, he was trying to do the best he could and human nature may be fallible, although,

as far as he can see, the whole world of the little court-room where he sits has conspired to show him that he is divinely endowed.

His position is not exactly one of bluff, but he is the central figure of the stage; like the actor's profession the judge's job makes him an egotist. Take for example the essential elements of his knowledge of the law. He is the *Jus Dicens*, the one saying the law, the name of judge being derived from the two Latin words. He is supposed to know the law, at least he ought to know court procedure, and the law of his State thereon by heart. In New York State, for example, the Code of Civil Procedure is five hundred thousand words long. He is bound to take judicial notice without being told of all the statutes of the State Legislature, which are being passed at the rate of six hundred a year.

He is also supposed to know the laws of the United States passed at Washington, and to be thoroughly familiar with the latest decisions of the Supreme Courts of the United

States, and those for the past 125 years. He must understand and look as though he knew beforehand any decision of the courts of his own State cited, which are conveniently and neatly printed in 219 New York Court of Appeals Reports, 173 volumes of the Appellate Division Reports, and 96 volumes of the Miscellaneous Reports, to say nothing of the opinions and decisions of other courts that are not printed at all. His knowledge of the law is a fearful and wonderful thing; he must have an oceanic mind.

It is told that one of the leaders of the bar had formerly a young man in his office who with advancing years and reputation was elected to the bench. Before the first of January when he was to take his oath of office, the old employer and friend sent for him. When he arrived he was greeted as follows: "Joe, I've sent for you because I wanted to see you before you become a judge. I am very fond of you and I wanted to see you once again as you were, because after you go

on the bench you are bound to become a stuffed shirt, for they all do."

That so many escape is one of the wonders of human nature. That they retain their humanity is due to a disposition of Providence to temper the wind to the shorn lamb. The position necessarily takes away all initiative. In politics the judge is recognized as being a "dead one." After a few years on the bench only the exceptional man can fling off the shackles of his profession and get back into real life. He ceases from fighting, he is not energetic.

As a good judge he must be firm but restrained. He may not be too emphatic. Every inducement is toward making him lazy, fat, and easy. Before him everyone bows and waits for him to speak. He is the absolute boss within the four walls of his court-room. The only restraining influences are the reactions from the lawyers and spectators who are before him. Their opinions can not be openly expressed; they are reserved until afterwards. If a judge really

has any idea of the high esteem in which he is held, let him find out what is being said of him after the case is over, as the clients and lawyers are going down in the elevator, or what the rear benches have been whispering.

He probably has a suspicion of this, but no matter how tolerant he desires to be, there is the temptation to show that his authority is supreme; that when the lawyers begin arguing a point on which he has formed an opinion to cut them off; when the witness is trembling on the stand as to whether the accident happened on a Thursday or a Friday, to ask her, "Don't you know that Thursday was on the 16th of April last year," which of course she does not. There is the temptation to feel that he can never be wrong; that a question may be reargued, but that he is not going to change his opinion.

The possibility is that the judge is a mild sort of bully. But it is not always safe to go on the assumption that being a bully he is also a coward. He may be, but on a trial the odds are too much in his favor. If the

lawyer wants to fight the judge, he has a great deal at stake; he may awaken so strong a prejudice that the judge knowing the rules of the game better than he does, may beat him on a technicality. On the other hand it is a mistake for the lawyer to be subservient and too cringing. Being a bully, the judge is apt to take advantage of his position. The best policy is to appeal to his human instincts as a man. He may be decent in spite of critics of the courts to the contrary notwithstanding. If he is kindly treated he will respond.

In New York judges were appointed until about 1846, when there was a popular upheaval and the constitution was changed, and they have ever since been elective, with the exception of some of the minor courts. The advantages of the two methods is an open question. The arguments in favor of appointment are that it makes for an independent judiciary and that it secures better men for the bench, whereas the other does not, because the highest class lawyer

will not go through the turmoil and supposed degradation of a political campaign. These arguments are not sound.

The argument for the election of judges is that it keeps the bench more humane, modern, and in touch with the will of the people. The one is the aristocratic idea, the other the democratic. A court as at present constituted is an autocratic institution but the judges should be democrats. A feeling prevails that the man who has gone through a course of political sprouts involving the training of election campaigns, is more understanding of the wants of the people whom he is to serve, also that courts should be arranged on a business basis.

An amusing aspect of an elective judge is that he is in an anomalous position. If he plays politics, endeavors to make friends either by his decisions on the bench or obeying the mandates of a superior political boss as to appointment of referees and receivers, he immediately becomes a corrupt judge. The stench of his unjust decisions will sooner or

later come to the nostrils of the community and his chances of reëlection are forfeited. He runs the hazard of charges and removal.

If, on the other hand, he forgets the organization that has elected him either in the matter of patronage or the refusal of some desired court remedy, and so conducts his court that there shall be neither fear nor favor, he is a political ingrate and deserves neither reëlection nor promotion. Of course these are the two extremes; fortunately human nature is not what the sociologists and political theorists would make it.

The political boss is not the unscrupulous ogre that the muck-rakers picture. He does not order the judge to decide the hundred-thousand-dollar-contract case in favor of his hench man. He might like to have him do so but he does not ask. Neither does the judge lean over backwards in the other direction and imprison the contractor because he is a friend of the boss. The movements for the non-partisan election of judge show the recognition of some of these incongruities.

The fierce bright light that plays about a throne also makes the judge conspicuous. If he sneezes, if he coughs, if he takes a glass of water he is probably feverish and cross. If he keeps still he is going to sleep and not paying attention. If he gets up or sits down it is noted as indicative of how he is going to decide the case. Every movement is watched. The position of a judge is not enviable. He is the concrete object to which the evils of the court-room attach. To the popular mind he is the court, the law, the method of procedure, the source of all the technicalities, and the delays. The beaten side will bear him a grudge, and the winning side think they ought to have got more.

If he be lenient in interpreting the law, he may be called to account for inability; if he be too strict, he is accused of irritability. If he be too polite, he may seem to be extending favor. A justice of one court, wishing to be kind, once asked a young counselor whose case had been dismissed through a technicality to come up and sit on the bench with him.

The young man afterward complained to his friends that the judge wanted to shame him and make him conspicuous.

There are few judges who dare to cut short the examination of a witness, although the length and direction of a trial are supposed to be within the discretion of the judge. He is hindered by the technicalities of those who insist, hoping for a reversal on appeal, and sometimes the same technicalities are used to prevent the actual facts being brought out. The solution probably lies in extending the powers of the judges over the conduct of a trial.

He has a position of interest and authority and one that commands respect. In England he dresses for the part in silk stockings and is next to the king in importance or about equal to a bishop. In Germany he is a little better than a Herr Pastor or a doctor, but inferior to a young lieutenant in the army. In France the salaries of the judges are pitiable. The highest, the president of the Cour de Cassation, gets $5000 a year and

the lower judges only a few hundreds, with no possibility of earning anything by practicing law, but there the judges are persuaded to take out the balance of what they should have in salaries in the honor of their position.

We are so shockingly frank and matter of fact, that we believe that the conventionality of pomp and circumstance have been too much regarded in courts and court procedure. that dignity is not accomplished by wearing a wig, knee breeches, or gowns of ermine and silk. It is consistent with a plain-spoken people to feel a contempt for state and symbols. Any attempt to return to the conventionalities of Europe is met by the contempt of a democracy.

In rebelling at form we have been so occupied that we have not been awake to a change in substance that has been demanded by modern conditions. The courts are gradually reaching a simpler basis. Formerly they may have been surrounded by more pomp and magnificence, but the work is now being better laid out and the course of the

proceeding is on more modern lines. Changes in practice acts will revolutionize trials. People smile at the dignity of their courts and judges. The modern spirit is for greater frankness, simplicity, and directness.

If he is a sane and reasonably simple man the judge tries to do his duty according to the light that is in him. He knows some law, has seen a quantity of human nature and passions flowing before him. The court-room, his position of authority, the respect of the community, the human drama, the abstract and intangible demand of something above the actual awakens in the judge that passion for justice which is a quality almost divine. The man himself becomes patient, understanding, and humane. Nearly every man, no matter how small he may be at the beginning, rises to the responsibilities of his position. So it is with the judge.

It is undecided whether the judge is entitled to more respect from the lawyers and laity or whether the laity is entitled to more respect from the judge. The judge

sits indolently crumpled up in his easy chair; before him a leader of the bar is arguing. In an eloquent manner he is pleading for a young attorney who is about to be punished for "Contempt of court."

"And so your Honor will realize that in the heat and excitement of a trial, in the turmoil of the legal battle, in the intensity of a forensic struggle, the young man may well have forgotten the respect and deference which is ever due from a member of the bar to the representative of high-minded justice."

The judge seems unaffected by the appeal. The young man had been rude and impertinent, the fine of $250 must stand as punishment for his misbehavior.

Suddenly the pleader with a wave of his hand and a twinkle in his eye says: "Look at the difference between the position of a lawyer who, alert with restless energy, momentarily forgets his manners in fighting for his client, and on the other hand the calm"—pointing to the judge who is still half reclining

in his chair—"the calm, I repeat, of complete judicial repose."

There is a smile through the court-room. The judge straightens up, sees the humor of the situation, and the fine is remitted.

There is a constant play of opposing influences upon the judge. As an upholder of the law he becomes a formalist and a reactionary. The insistent demands of humanity which the statute law can never satisfy, tend to make him a revolutionist. The saving element for him is that he is only a part of a system for which he is not responsible.

When the judge has had the list of cases for the day called and has disposed of the applications for adjournments, he turns to the clerk who begins to call the roll of the men who are to act an important part on the stage—the jury.

The solution of the matter so far as the judge is concerned is to give him greater power. Let him be absolutely responsible for the conduct of a case in court. His

position should not be that of an umpire who remains quiet until a dispute arises, but rather that of a head enquirer into merits, assisted by the two lawyers and the jury.

IV

THE ANXIOUS JURY

IV

THE ANXIOUS JURY

THE main characteristic of the jury is that it does not want to be in court. The name comes from the French word *Juré*, sworn, or the man who has taken an oath. There is probably no reason to suppose that the word is derived from the state of mind in which a juryman finds himself, nor does it mean the words he has expressed with reference to his duty: more properly it is the men who are sworn to do justice. The implication of the word serve is that there is some punishment or penalty attached to jury duty. It is not regarded as penal servitude by the average man, but it seems near to it. While he is serving, his business goes to pieces, his wife misunderstands why he does not come home

to dinner and his whole life is disarranged. When a man has served on a jury he gets a discharge paper.

Jury duty is one of the obligations of citizenship and its highest duty; at the same time it is one of its privileges. Foreigners and idiots cannot serve. Doctors, soldiers, journalists, clergymen, and others, besides those who are deaf, blind, or otherwise disabled, are exempted. The experience of serving on a jury may be annoying but it is broadening and gives an opportunity of seeing human nature in a way that few appreciate. To serve on a jury is to become a part of the judicial system of the State and for the time being to belong to the governing class.

"All day long," says the court officer, "they do nothing but grumble and grumble at being kept away from their business but when they get chosen on a case, they realize it does not do any good so they settle down to do what is right." The country man may not have much to do and may look on

jury duty rather as a diversion or vacation from farm work but the average town man feels the $2 a day he receives is only lunch money compared to the amount he is losing in his business, and so he hates it.

The first warning of trouble that a juryman gets is when he comes home and finds that a policeman has been looking for him. It is to be hoped that he has a guiltless conscience. He inquires further and learns it was only a court officer summoning him to court for the trial term next month. His first concern is to see what can be done in a political way. If he belongs to the local club of the district—but here let the curtain be drawn. Besides he may accomplish very little, so many of the judges do not seem to remember their political obligations. Then he tries to reach the judge through a friend and when that fails he makes his way resignedly to court on the appointed day.

When he comes there for the first time he smiles at the court attendant and tries to make friends, but the court officer who has

been there many times before is not at all susceptible. Perhaps he hurries around to the judge's chambers and manages to see the judge's secretary, who is sympathetic over the fact that the month is December and the busy season of the year in the florist business and that there is only one assistant in the shop, but the judge is busy and will only see him from the bench. Finally he goes into court and waits for his name to be called.

After the roll call, he goes timidly up to the rail and stands there waiting until his Honor will take notice of him. His Honor is busy blowing his nose or signing papers. Finally the court officer points him out. The judge scowls and asks him what he wants. Tremblingly he explains his difficulty: that his business needs him or that his wife is sick and that he will serve any other month if he can be let off now. The judge reads him a lecture on the duty of citizenship and the responsibility of jury duty and says he is sorry that he can not excuse him.

Afterwards when the judge finds that there are enough jurymen in court for the needs of the calendar, he may privately send word to the juryman by a court attendant that he is excused for the term or for a few days until the Christmas rush is over or his wife is better. Judges are often humane, but if they were to excuse the juror openly they would find all the others in court clamoring for the same exemption. If the juryman merely wants to dodge the duty he probably does not get excused. The judge seems surprisingly intelligent and discriminating and able to pick the sheep from the goats. The man who merely wants to escape serving usually has to, and the man on whom it is a hardship is sometimes let off. Uniformly the jurymen feel that it is a necessary evil, but not so bad when they are once in court.

Until a case is called for trial they sit about the court-room or walk in the corridors. In the meanwhile, the judge is arranging the calendar, and they have been watching the

maneuvers of the lawyers to have their cases put off, or they may have seen the amusing little by-plays when one lawyer crosses the aisle of the court-room, button-holes his opponent, and whispers something to him. The other lawyer motions to his client and the party moves to the hall where there is a secret conference about a proposition of settlement. Something is agreed upon or they may not come to terms and decide to go on with the trial. If there is to be a settlement the two lawyers walk up to the rail and say:

"Will your Honor excuse us if we interrupt and mark the case of Allen against Brewster settled." The judge smiles with pleasure; he does not mind at all being interrupted for that purpose. He is pleased to have one more case off the score.

When the time comes for the selection of a jury they wait for their names to be called with the thought that the axe is about to fall. As they are examined they answer the questions of their occupations and opinions

truthfully, but if for any reason they are excused, they leave the box with a smile at those impaneled and a sigh of relief as at danger escaped.

Like many honors, the position of foreman of a jury is an empty honor. He has the first seat and he heads the procession when the jury walk in and out of court; he also announces the verdict, but he has no actual power either in the jury-room or in the court. If there is a vote to be taken, he has no deciding voice, but in the deliberations he quickly falls to the level which his attainments justify.

During the trial a feeling of resentment at court procedure grows. It is not the judge any longer who is keeping and delaying them. The witnesses appear like fools it is true, but the lawyers make them act more foolishly than need be. Why does the judge make such absurd rulings? The law must be an unreasonable thing and the judge evidently knows a great deal about it. Why can't the witnesses tell what they know? The most

tiresome parts are when the lawyers begin arguing about the testimony. One side wants the witness to tell something and the other side does not. The judge keeps still and lets the lawyers go on talking as though it were something important, perhaps he can not help it. The lawyers or the judge can not have much to do. The judge it is true is paid to listen, but the lawyers must be pretty hard up when they will go on talking in that way. No juryman would stay here wasting his time during business hours, and afterwards there are the newspapers, supper, and taking the family to the movies, all of which is far more sensible.

"Say, it's like a vaudeville show to see those two go on," thinks the juryman. "You couldn't beat it if you put it in an act. Georgie Cohan or Joe Weber could make their fortunes if they only hired the lawyers as actors or came into court for their material."

Occasionally the judge calls the lawyers up to his desk and together they talk over

something which the jury can not hear. The jury look as though they did not care. If they want to talk some more—well, let them. Perhaps they are planning some game, and the jury will wait until their turn comes. In the jury-room they can show them what's what; that is where they know their chance is coming. Even if the judge is only trying to find out something about the case, that is a sensible thing to do. Why don't the lawyers come over and talk to the jury like that? In a few minutes they could ask them some questions that would settle the whole matter.

The strange part is when a witness has said something and told how he or she feels about the whole case, which is exactly what the jury want to know, one of the lawyers jumps up and says he moves to strike that part all out and the judge strikes out. The lawyer having scored a hit, then says:

"I ask your Honor to instruct the jury to disregard the testimony just given."

"Gentlemen," says the judge, "the evi-

dence just given has been ruled out by the court and is not relevant to the issue, and I must instruct you to disregard these words of the witness and in arriving at your verdict not to consider them."

Of all the absurdities that happen in court, the jurymen think that is the worst. Does the judge or the lawyer believe for a moment that because they say so the jury are going to forget what the witness said, especially when it was the very thing they wanted to find out? They watch the stenographer and they notice he does not even take the trouble to cross it out of the notebook.

Occasionally a juryman becomes particularly interested and wants to question something. Usually he is too self-conscious to run the risk of being snubbed, but sometimes he is bolder and ventures a question.

"Why," asks the juryman, "didn't the defendant give back the goods if they were not what she wanted?" Both lawyers are on their feet. There is a mute appeal to the court; both sides are afraid to object to the

question for they think the juryman may have a prejudice if he were stopped. The judge usually comes to the rescue and tells the juryman that he is sorry, but that his question is manifestly improper in form. The evidence should be whether the defendant did a certain thing or did not do it. The reason why he did it is not in point. After two or three attempts of this kind the juryman subsides and sits patiently through the trial without any suggestion. He thinks that there is a hopelessly complicated game being played before him and he does not attempt to interfere.

There may be some truth in the theory of the attorney who says:

"Always look out for the juryman who asks your witness questions. He is against you. If he absolutely believed the witness he would let it pass without questioning." This reasoning may be used as an argument either way, for if the juryman believes the witness he may feel that he should like to have him tell more. Or if he does not accept

him as truthful, he thinks it will not be worth while to ask him other questions. An inference may be drawn as to the juror's attitude for and against.

An inexplicable thing to the jury is when the judge takes the case away from them and directs a verdict or dismissal of the complaint. That the jury should be compelled to listen to all that mass of testimony and then at the end not have a chance to decide is unreasonable. If the plaintiff did not have a case, why did the judge let them go on? He should have found it out earlier instead of wasting all that time.

After the whole case is in, it may happen that both sides move for a direction of the verdict and then the jury have nothing to do. The judge says:

"Gentlemen of the Jury, I direct you to find a verdict for so-and-so." Before they have a chance to say whether they will or will not, the clerk announces a verdict for so-and-so. This is very annoying and discouraging, especially when the jury were going to

find a verdict directly contrary to the way the judge decided. Technically they have a right to refuse to find a verdict as the judge directs, but if they did, only a mis-trial would result.

It is an illustration of the difference between the function of a judge and a jury. The jury pass on the facts, the judge on the law. When the judge dismisses the case, he is saying that the facts may be so and what happened may be truly stated, but even then it does not make any difference. The law is that those facts do not make out a case. Only when the facts make out a case do the jury have any function. Then it is for them to find out whether the facts are as the plaintiff claims them to be or as the defendant. The jury are usually puzzled and do not understand the distinction. In certain cases the judge determines both the facts and the law and decides the whole matter. In those cases, and in what is known as equity, there are no jury, but a judge may always ask for a jury if he wishes one to determine the facts.

A jury is supposed to be advantageous to the defendant in a criminal action and to the plaintiff in a civil action.

"One judge is better than twelve," says the advocate of the non-jury system. "Law is a technical thing and you can not put a technical case plainly enough so that twelve men could thoroughly understand it."

A discussion of the jury system is not in place. The jurymen have already been summoned and are in court and until the structure of the law is changed they will remain. They are ready to try any case that may come before them. The judge feels a sense of relief at not having to pass upon the facts. The law being laid down, all that remains for him to do is to see that the facts are fairly and plainly presented to the jury, that both sides conduct the case in a reasonable manner and that the trial be as open-minded as possible. The anxious attitude of mind toward the jury is that of the parties who are to be judged, the lawyers and their clients.

The jury do not become very excited over the wrongs of one side or the other. They certainly do not enjoy the trial or look upon it as an example of a good fight although under the present system of procedure that is what it is supposed to be.

V

THE STRENUOUS LAWYER

V

THE STRENUOUS LAWYER

OF equal importance in the cast are the lawyers. They play the parts that represent action. The judge and jury are the heavy characters. The clients who make their entrances and exits as they take or leave the witness chair are of minor importance. The lawyers occupy the center of the stage the greater part of the time. Their clients sit watching, the judge and jury keep silent and listen to them.

In order to make a trial or a contest there must be two sides. There may be three or more lawyers, but usually they divide themselves into two groups and take sides. The attacking party,—the plaintiff, complainant, or prosecutor,—naturally the more aggres-

sive, and the man who is defending himself.

The latter's lawyer is the one who is wary and alert. Sometimes the attacking lawyer having gained a position sits down and defends it. During the trial there is a constant change of attack, the taking of a redoubt, charges and countercharges, trenches captured and forsaken again. The intellectual and legal battle is as bitter as any physical one. To the understanding observer and the participant it is momentous and intense.

While the contest is waging there is no intermission. The fight is always hot, keen, bitter. Quietly as the lawyer may handle himself, underneath his calm exterior he is ready to fight, bite, scratch, shoot, kill, slash, but always he must do so under the rules of the game, never hitting below the belt. What the battle is about is the issue, the result is called the verdict, or the decision, and the formal statement of the court as to the result the judgment.

The contest is so real it soon ceases to be a

play. It is too much in earnest and whatever humorous quality it may possess never loses the underlying intensity of human conflict. One noted trial lawyer says that he always feels the loss of a case in the pit of his stomach, another that he can never begin a trial without mopping his forehead for fear that beads of perspiration might be apparent. However ordinary and accustomed court trials may become to the participants, there will always remain the deep underlying stress of human passions.

As lawyers are watched, they may appear alternately as jumping up and sitting down like jacks-in-the-box or those weather figures, where if one goes in the other comes out. Their appearance differs in the different courts from the higher courts where the well-groomed eminent leader of the bar, with thin lips and white side whiskers debates in a frock coat before the appellate court, questions of international importance, or the anxious-eyed little attorney where in one of the lower courts with a showy dia-

mond ring and a handkerchief sticking out of his pocket in the shape of an American flag, argues, while chewing gum, whether his client shall pay the fourteen dollars rent or not.

There is never any peace between them. Occasionally there is a truce when they come together to agree on a certain state of facts, or conclusions of law, but essentially they are at war; otherwise they would not be in court. The only reason for their being there is an issue to be decided.

Often so eager do they appear that physical violence seemed impending. It is as though they were on the point of breaking into fisticuffs. The judge says: "Gentlemen, gentlemen." They appear like two naughty schoolboys who have to be controlled by their master. First one is restrained and rebuked, then the other is held strictly to the rules of the game. Like schoolboys, although they may be fighting one another, they appear at times to be in league against the judge. As in a baseball game, both sides

join against the umpire. There is a common class feeling between the lawyers leaguing them against the judge. This may be explained perhaps by a rather subtle psychology.

The lawyers are primarily in court to please their clients. Every ruling of the judge against them on even minor points of evidence, any adverse decision is fatal to them from the point of view of retaining the client for the next litigation. They watch the judge with lynx-like eyes. Is he going to drive the client away from them? Should he reprimand them or speak severely, their client would think that they had angered the judge and so they had lost the case. Defeat in a case is so important that if a lawyer loses a case he probably loses his client.

In one of the lower city courts on the East Side, a young attorney came in one morning with a scar across his cheek, a scratch on his nose, and sticking plaster on his chin. The judge had often seen him before. After the

case was over he called him to the bench and said that he was sorry he had an accident, and asked him what had happened. "Oh, not much," said the lawyer, "last week I simply lost a case for a client."

The complaint of the lawyer against the judge is always that he has forgotten that he was a lawyer once himself. He does not realize how important it is that the lawyer should make a good impression on his client. His feeling is, if the judge cuts him off when he is arguing, the client will think that he is talking foolishly. The judge overrules his objection. The client thinks the judge does not like him. The judge denies his motion to strike out, he evidently does not look on the lawyer favorably. The lawyer's chance of display is in talking. If he is not allowed to go on he feels the judge is unreasonable in not listening to him.

The nice lines to be made by the judge between consideration for the feeling of the lawyers and insisting that justice be fully and speedily accomplished, are hard to draw.

On the one hand there are the courts where no limit is put to the digressions of attorneys and where they may wander on and on, apparently merely to display their oratory to their clients, and other courts where the undoubtedly bad manners of the bench to the bar are unforgivable.

Control of the trial is necessary because it is a struggle in a court on a defined area. It is an intellectual ordeal by battle, a capping of intellects. It is like a game of chess in which luck is eliminated, the board is free, the pieces are equal, the way in which they may move is fixed by the rules of the game of court procedure. The element of chance is made not by the court or the procedure, but by the fact that the pawns, the castles, and the knights are not of ivory, but are human and mutable.

The lawyers are discontented with the courts, while the judges feel that the deficiencies are the fault of the lawyers. The lawyers, they say, do not coöperate with the judges in the administration of justice,

and are too busy with their own game. Here enters that academic question of whether a lawyer's duty is first to the court and justice, or first to his client,—should he defend a man he knows to be guilty. The dispute is sophomoric. He is the advocate of his client first, foremost, and all the time. That is the reason for his existence. He is the agent for his client; his tongue, brain, and energy belong to his client. He is undoubtedly justified in whatever he does, if he keeps to the rules. Justice is best promoted by heeding the rules of justice to the utmost.

It is to be remembered that the lawyer occupies an uncertain position. As an officer of the court he is sworn to promote justice; as a champion in the battle he is under the deep obligation of performing his utmost for his client. At times the conflict between his duties seems real. As an officer of the court he has the privilege of the floor. He can be heard and is admitted to the court. It is as though he had joined a club in which duel-

ing or gaming is permitted. The obligation resting upon him is to act as a gentleman and obey the rules and not to cheat. If he keeps to the rules he is presumably a gentleman and can do what he pleases for his clients.

If there is any complaint about the courts it is held to be the fault of the lawyers, if there are criticisms of the lawyers it is the fault of the courts. They are interdependent and indissoluble. If a club house is not suitable for its purposes, is old-fashioned, rickety, and dirty, it is the fault of the members. If the members do not behave the club house gets a bad reputation.

Courts are institutions, and not persons; the lawyers are the individual stockholders. If by his actions in court or in the club he brings disgrace on himself as a lawyer or upon his club, there is very little to be done about it. The club membership may be more limited and select, but the building will not be improved except that it may be swept a little cleaner.

The judge as the president of the club

must see that the lawyers observe the rules, he can not rebuild the club house or materially change the rules. The only persons who can effect a change are the lawyers. As members, they are agents for their clients who are the public at large. Occasionally the public awakes to a realization of their power over both courts and lawyers, that they are their creatures; then happens a revolution in procedure and something is accomplished.

The lawyer waits about the courthouse for his case to be reached. It may take days or even weeks before it is marked ready. He wastes his time. The witnesses have been subpœnaed. They have to be told to come again the next day. There is little money in it for the lawyer. Office practice pays better than court work and except for the eminent pleaders there is but small honor.

During the trial the lawyer seems to be sparring. He takes the attitude of saying: "I want that point of law decided; it is such a nice point, it ought to be settled." As a

matter of fact he only wants it settled in his own favor. It is not the abstract interest but the concrete fact in which he is interested.

The lawyer is vigilant from the beginning of the trial to the end. After the case is marked ready he watches the jury, the other side, and the judge; any movement may be of importance; if it escapes his notice he may lose his whole case. It is not safe for him to go on the assumption that the other side is as honest as he is. If they should attempt to put in some evidence that is not proper, to offer a paper that is not duly authenticated, to try by some trick or device to take an unfair advantage, he must be ready to pounce upon the incident. If he is quick he may turn it to the advantage of his own side.

The other lawyer among a bundle of letters offers one that is only a copy or is not signed. The lawyer notices it but keeps still and when at the proper time calls the attention of the judge and the jury to the fact,

the plain implication is that the other side must have a very weak case if it needs bolstering up by such methods as this. The argument is that he let the paper go in without objection because he thought the matter trivial anyway, and he wanted the jury to see the underhand method of the other side.

The indefinable quality of personal magnetism is of much vaunted importance. It is like that horrid word, charm; no one knows what it means and seems to have a supernatural quality. The trial lawyer does not need either charm or magnetism. They are both nonsense. Like actors or fighters if they are sufficiently trained in their parts or know how to use their weapons, the lawyers' personal magnetism over judge and jury will come of itself. The judge is a fairly hard-hearted person. The jury may be governed by sentiment but they are an example of the average man and neither are going to be caught by smile or mannerisms. Sound qualities will prevail.

A fine-looking trial lawyer who thoroughly knew his business once had a hard case. His appearance and manner impressed the jury. They followed his every motion. The trial was long and tiresome. It was the days of those little iron puzzles to get two rings or anchors apart; occasionally he would take one out of his pocket and begin playing with it. The jury would follow him with their eyes to see whether he could do it. Whenever he thought the evidence for the other side was getting too interesting, out would come the little iron puzzle and the jury would pay more attention to its solution than to the witness on the stand. He won his case but that is no reason to recommend the playing of "Pigs in Clover" in the court-room. The reason he won the case was because he was the capable man and on the job.

The lawyers' profession is not a creative one but the value in the social structure is cohesive. He brings together the investor and the manufacturer, he amalgamates capital and labor on a sound legal basis. He

adjusts conditions to the laws and laws to the conditions. His is the most large-minded of the professions. He is theoretically the layer of the law. In every community the eminent lawyer is the eminent citizen. No one commands greater respect. But there is no doubt that the inefficient administration of justice is the fault, to a large extent, of the legal profession.

The fine, kind face of the lawyer who, ripe in years and understanding, beams a genial smile is a living reproach to the detractors of his profession. Painstaking, scrupulous, broad-minded, and intelligent, with a twinkle of humor for the frailities of humanity, he looks on the pettiness of men with a wise tolerance. Beneath his ease of manner and cordiality of intercourse there lies a world of experience, of battles fought and won, of inherent force of character, of public honors received and gracefully borne. There are no limits to the admiration and love to which he is entitled.

Beside the lawyer, and watching him with

worried eyes, sits the client, who unless he is in the wrong really wants the lawyer to bring out the facts in the case rather than to have him exhibit his qualities as a fighter.

VI

THE WORRIED CLIENT

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THE WORRIED CLIENT

LIKE the financial backer of a play, the client does not figure largely on the stage. If he does appear as an actor he may have a small speaking part, but he is not a star. He owns the show, and if it does not pay he loses, or if he wins he gets a proportion of the profits. Consequently he hires the best talent he can afford. The star performer is the lawyer, but as the producer the client has not only the choice in picking the theme, but the play is about him and his troubles. Great drama consists in a conflict of emotions. The emotions of the two opposing clients make a court drama. The acting and the staging is the art of the lawyer.

The philology and derivation of the word

client is significant. It does not mean the principal, but a follower. It is derived from the Latin word *cluere* and the Greek κλυειν, meaning to hear; one who listens, a follower.

An ordinary man has a horror of the entanglement of the law. A hard-headed man of business says he would rather pay a claim of $250 or less, although he had never seen the claimant, and the suit was utterly unfounded, than go to court. He would rather lose the same amount than bring a suit involving the trouble and expense of hiring a lawyer, requiring witnesses to waste their time, and wasting his own in waiting for a trial, which might possibly result in a judgment against him on a perfectly just debt, either through the miscarriage of justice, or the chance of not collecting the judgment. The typical feeling is that of the stockbroker who said: "Only blackmailing suits go to court, for if sensible men have a dispute they know it is easier and cheaper to settle it outside."

The client is in a darkened room. He only

partially sees what is going on. If the whole case is thrown out of court on a question of law or a technicality he feels more than resentful against the judge; he is revengeful; he will spend every cent he has in the world appealing and showing that judge how wrong he is. In the first place, it is a disgrace.

"Why," he says, "the judge just kicked us out of court. We didn't have a chance; the judge must have been friends with the other side. Do you call that justice? I'd like to get that judge outside and talk to him man to man. No one can get a square deal in court."

The feeling of the client toward the courts and the lawyer is one of distrust, mingled with respect. He will say:

"I would rather take a friend's word as a gentleman that he would do something than to have it put in the form of a forty-page contract drawn by the best lawyer in the country. I could rely on the word of a gentleman, but if any question on that contract came into court, some clever lawyer

would find a loophole to get out of it." Yet the fact is that the world does require legal documents. An interesting speculation would be to consider what proportion of the world's business affairs is conducted on a basis which could be provable or have the authority of enforcement in a court of law. The proportion of the business transacted in a so-called legal manner is insignificantly small.

The numberless transactions of the retail stores in a great city; such cases of proving that a pair of gloves were sold, delivered, and not paid for are extremely difficult to prove. The expense and trouble involved of subpœnaing the different departments and of breaking up the routine of the store, would prevent the stores becoming clients. The enormous transactions on the New York Stock Exchange, where a hundred million dollars' worth of business is reputed to be done in one day, is entirely on the basis of personal honesty. So far as the court goes, should one party to a stock sale not be willing

to complete, there would be little possibility of enforcing it. Therefore the Stock Exchange makes its own rules and has its own method of settling disputes. The world at large is not a client in the court. The man who becomes a client in the sense of litigant is an exception. The courts would seem to be unrelated to the demands of actual business affairs.

Times have changed since the Victorian days when a solicitor was the client's deferential servant, the steward and custodian of the landed gentleman's legal affairs. Then the lawyer had a profession which he carried in his head. Law reports contained a few thousand, not a million decisions, and there were no title insurance companies to make a business of determining the ownership of real estate. Yet in those days the legal adviser was not a very exalted person, ranking beneath the soldier and standing hat in hand before the gentleman of property, to whom he owed his living. The citizen who wished to learn whether he or his landlord

should clear away the snow on the sidewalk, went gravely to a lawyer's office and paid a fee for the information. It is obvious that lawyers do not make their living through small fees for giving advice. As a matter of fact, those whose work is more remunerative than a street-car conductor's or a carpenter's, make their living through business and not in small litigation.

To-day lawyers complain that their profession is slipping from them. But they have gained the prestige of business.

"I am a business man, not a lawyer," says the elderly leader at the bar, and scarcely knows whether he is, on the whole, gratified or regretful.

Their abilities are used in directing the conduct of business from a legal standpoint and protecting it from those who are ready to prey upon it. Business needs protection from other business, from accident cases, and libel cases. These frequently get into the courts. Citizens need protection from business and seek it in the aggressive form of

suits for damages. Big business looks on the courts as instruments of blackmail, and the small citizen feels that the courts are inadequate to protect his rights. It makes a deal of difference which side they are on. But in any case the present-day successful lawyer is primarily a business man.

A corporation is a legal creation; a lawyer is its mother and nurse. The stockholders having the curious relation of being partners, one not liable for its debts—if its legal affairs are properly handled. And so the company retains a lawyer at a yearly salary to give them advice and that legal protection. Prominent lawyers are taken in as partners of the big banking firms. The large industrial companies have the highest priced lawyers exclusively attending to their affairs. Accident Insurance Companies have enormous legal plants as efficiently organized as factories for handling damage suits and against whom is opposed the inexperienced lawyer of the individual citizen.

Furthermore, the corporation, though com-

posed, in reality, of individuals, is less personal than any one of its members. It is a client without keen emotions, without too distracting hopes, fears, or suspicions. Law is an exacting science, arduous and complex. The lawyer, to do his best, should work quietly, disturbed as little as possible by the human interests at stake. If then the lawyer is correct in preferring the soulless corporate client, it must be that the ordinary individual is either too poor, or too human. Naturally, the corporations are not only the most satisfactory, but the most desirable clients.

The client, although he is the originator of the drama is in reality only a listener. The client in court has so little to say and the lawyers have so much, that it seems unexplainable. The reason is that the lawyers are the fighters, the champions, the knights in the tournament. A legal battle is only enacted because the lawyers are expert fighters. The client having hired them, has little to do but watch. When men first went

to law they had no champions; they fought and took what they could, but as civilization advanced men became too busy to engage in legal or actual battles and there grew up a specialized class of fighting men. The lawyers are the hired mercenaries of the commercial structure; and the clients are the ordinary business men. True, some of the lawyers are free lancers, but the majority have the sentiments and standards of their class. There is a natural class antagonism between the client and the lawyer. The client is afraid and mistrusts the lawyer; and the lawyer feels that he must act for an unintelligent client who is ignorant and inexpert. So long as the courts continue to exist on their present plan the difference between client and lawyer will be marked.

An example of a return to formalism and a reactionary development has been the change in what is known as the Poor Man's Court of New York City. It was originally planned as a court where the client or man unlearned in the law could come in to sue in a simple way.

They were simple justice courts. The limit for which he could sue was $100, then $250, then $500, now $1000. Formerly the judges need not be lawyers. A trial was an informal affair. The judge would line up both the parties at the rail. One side would tell their story, the other side would interrupt and finally get a chance to tell theirs. The judge would figuratively pat them on the head, decide the case, and tell them to go home and be good.

The New York Legislature recently passed a law making the court a court of record, and making all the provisions of the Code of Civil Procedure applicable. The code with its half million words is therefore a part of the procedure. So that the client now before he goes into court without a lawyer ought to familiarize himself with the code. Formerly these courts may not have been dignified. Pandemonium would break loose and the litigants begin screaming at and abusing each other. Often the judge was obliged to apply a somewhat arbitrary and paternal rule.

Now the courts are more dignified and formal, but the clients are disappearing from view. They are in fact afraid to come into court without a lawyer.

While the dignity and efficiency of the court have been increased, it has almost ceased to be a court for the poor man; indeed the procedure is so technical that, although possible, it is rather unusual for a man to come without a lawyer. Of course, the attorneys who make their living by appearing in small suits where the fee is often a contingent part of the small amount recovered, or a fixed charge of $5 or less for trying a case, do not present examples of the best legal ability.

The point of view of the client is that he is loath to spend the money to hire a lawyer for defense. One litigant stated in court, when asked if he had not admitted the debt: "Well," he said, "I just went around to see the plaintiff to find out if I could not save a few dollars instead of hiring a lawyer." It is an open question which brand is the

best for the client, the rough and ready justice or the formal and orderly kind.

While the jury are being examined and during the opening of the counsel, the client sits quietly, but a trifle self-consciously, at the counsels' table. The talk is about him and frequent references are made to him and what he has been doing. He tries to look as though he did not care and was accustomed to the surroundings, and when the taking of testimony and the wrangles over objections and motions begin, he falls quietly into the background.

If it is a criminal action he is not on the stand during the People's case. When his side is presented his lawyer does the best he can to keep him from the stand, whether he be innocent or guilty. The well-known expression is that the defendant hangs himself by taking the stand. In civil trials the client may be a corporation or the owner of the injured automobile or wagon, but not a witness to the accident. He sits silent by his lawyer if he is wise, realizing that his lawyer

can fight better without being annoyed. If he is nervous, he keeps plucking at his sleeve and whispering advice. It is difficult for him to restrain himself. There have been months of preparation. The drama is being produced; to him it is vital. He knows more about the case than the lawyer. He wants to advise, suggest, and instruct. Why doesn't the lawyer ask the witness that question about what he told Smith or what he told his wife?

The client might be surprised if he knew what the lawyer was thinking of him. If asked, the lawyer would moisten his lips, draw a long breath, and then pause, not for lack of thoughts however. The best client in court for the lawyer is the silent client. One of the greatest calamities from the lawyer's point of view is when the client is on the witness stand and begins to get confidential with the judge and to tell him exactly how he feels about the whole matter.

"Why," said a lawyer, "I had a perfect

case and then the judge asked a question and spoiled the whole thing. I think it was outrageous, the judge had no right to interfere."

The attorney's feeling toward his client is contained in the wish that he wasn't there. The legal aspect of the case, the real point at issue, is probably something very different to what the client has in mind. The lawyer has an uneasy feeling that, in the client's eyes, he will not do the case justice.

"How outrageous," thinks the defendant, "that I should be sued when I've been overgenerous for years. And the jury ought to know exactly what these people are who said they'd call off the suit if I'd pay them a hundred dollars." The lawyer is aware of these views, because he has been told them more than once; he also knows that he cannot try the case in that way.

The counteraction of emotions and feelings between the lawyer and the client, the judge and the jury, the undercurrents that are constantly moving from one to another, make

up the drama of the court. The characters are laid, the theme is selected, the actors are chosen, and it remains for the play to be prepared.

VII

PROGRAMS AND PLEADINGS

VII

PROGRAMS AND PLEADINGS

PLEADINGS are the programs of the performance. They are printed beforehand and everybody gets a copy. Preparation consists in the rehearsal and the carpentry of setting the scene. Any lawyer knows how important the pleadings are, but nobody else does. The judge does not pay any more attention to them than he has to. Juries hardly ever see them; if they did, they could not understand them. The witnesses never hear of them, the clients have sworn they have read them and have sworn that they are true. Yet not one client in a thousand could give an explanation of them other than, "My lawyer told me to sign it, so I did."

Whenever anyone gets anxious to under-

stand a pleading, there are so many volumes about the subject and so many bookcases of decisions they would furnish a house. All this may appear flippant, but the subject is so absurd, abstruse, and abnormal to a man of business, that it is almost impossible to make it understandable. A partial list of authorities on the subject sounds like a chapter from *Alice in Wonderland:* Pepper on Pleading; Perry on Pleading; Pollock on Pleading; Pound on Pleading; Puterbaugh on Pleading; Phillips on Pleading; Pomeroy on Pleading. The number of court decisions in which this branch of the proceeding has been reverently and gravely dealt with reads like a metaphysical discussion in the dark ages. The names formerly used were superb. Complaint, demurrer, confession and avoidance, traverse, replication, dilatory pleas, peremptory pleas, rejoinder, rebutter, and sur-rebutter.

On the other hand the clear, concise technical statement of a case is not a matter to be laughed at; no clear thinking is possible

without it. No plain understanding of what the drama is about, nor what the issues of the battle are, can be grasped. Good lawyers are good thinkers and usually plain talkers. The present-day revolt against the confused pleadings may go to the opposite extreme and abolish them all, leaving the case to be presented as formless and loose. The vexed question of the proper form of a pleading may delay justice until it is determined on appeal from the City Court to the Supreme Court, then to the Appellate Division, then to the Court of Appeals. In the meanwhile the clients may die, the money in suit may be lost, while the audience is waiting merely for the programs to be printed.

In Perry on *Common Law Pleading*, reprinted in 1897, chapter thirteen is devoted to rules which tend to prevent obscurity and confusion in pleading.

RULE I. Pleadings must not be insensible or repugnant.

" II. Pleadings must not be ambiguous or doubtful.

RULE III. Pleadings must not be argumentative.

" IV. Pleadings must not be hypothetical or in the alternative.

" V. Pleadings must not be by way of recital, but must be positive.

" VI. Things are to be pleaded according to their legal effect.

" VII. Pleadings should observe the known forms of expression as contained in approved precedents.

" VIII. Pleadings should have their proper formal commencements and conclusions.

" IX. A pleading which is bad in part is bad altogether.

These are pleasant rules for a layman to understand, and any time he has a day off or a holiday he should study them.

"Shocking," cries the old-fashioned reactionary lawyer, "What! Do away with pleadings, you might as well do away with the whole case. Pleadings are like the rails for a train. No one on the train sees them, but take away the rails and the train would

not go very far. Pleadings are the groundwork of the trial."

He grows more and more indignant.

"The trouble with the modern courts is that they do not know what they are about. If this business of loosening the forms of pleadings had not taken place, lawyers would be better prepared when they came into court and there would not be this floundering about. The good old common law pleadings were the thing. It was a great mistake when they were abandoned. Then everyone knew where they were. If there was a mistake in the pleading then the whole case was thrown out of court. That was as it should be. Men had to be good and careful lawyers in those days. The slipshod methods of the present time are abominable."

"You seem to be a little hard," says the modern lawyer. "Justice ought not to depend on forms."

"You can never have justice without formalizing and shaping the dispute," says the lawyer.

"Quite true," says the modern, "but there has been too much attention paid to the form of justice. Pleadings are the mere mechanics like printing the program or laying the rail."

However, this is all a question that does not come up in the court-room at a trial. Once or twice some reference is made to the pleadings. Perhaps there is some such dispute as this. The defendant attempts to swear that he "paid for the goods then and there." The other lawyer jumps up and says, "I object, your Honor. In his answer he does not plead payment. He only pleads a general denial." The judge puts on his spectacles. The lawyers gather, business stops while everyone looks at the pleadings.

Or again the plaintiff tries to show that when he was thrown from the wagon he bruised his right elbow. The counsel objects there is nothing about injuries to his right elbow in the Bill of Particulars, therefore he can not prove it. The Bill of Particulars says that he hurt his hand, scratched the forearm,

and injured the right shoulder, but says nothing about the elbow. Grave consultation by the learned lawyers and the judge ensues. The defendant's lawyer is right, there is nothing in the pleadings about the elbow.

The case can not go on until that important question is settled. There is argument on both sides. The client looks anxious. The jury sit and wonder what that phrase of "the delay of the law" may mean. Finally a bright idea occurs to the lawyer.

"I move to amend, your Honor, so as to include the elbow." The other side looks shocked and disgusted. "What, move to amend in such a casual way as that. The pleading is a serious thing. It has been sworn to, you may not amend a sworn statement in that offhand way." The judge says that he will allow the amendment but if the other side is surprised he will grant an adjournment of the trial to another day. The other side says, "Pardon me a moment until I consult with my client." The judge

smiles. The lawyer goes over to his client and the client says, "For goodness' sake don't adjourn. I've broken up my business for a week to come here now; what's all this fuss about pleadings; let's get on with the case." The lawyer returns to the bar. "We have decided to proceed."

"Amendment allowed," says the judge. The witness now tells about hurting his elbow.

The preparation of a case goes on behind the scenes and before the drama begins. The attempts to rehearse are piece-meal. First one witness is seen, then another, their stories are told, their statements are taken, and they are drilled in their parts. They are told as to what facts they must testify. In one large company that has a quantity of damage suits, there is said to be a school for witnesses where there are dress rehearsals and they are taught how to behave in court.

The greatest farce that occurs in the court-room is the part of preparation that is involved in getting a case on for trial. There

being no limit to the time to examine witnesses, to hear arguments, to listen to objections, it is said to be impossible to tell how long a case is going to take. Consequently the calendar having been called, the cases following are answered ready, by office-boys with no expectation of their being immediately reached.

The grave and reverend judge looks over his desk and calls the case of Bowring *vs.* Bowring. "Ready for the plaintiff," answers a rosy-cheeked boy. "Ready for the defendant," answers another. They look rather young to be trying a case. It is marked ready and the office-boys sit about the court and telephone to the lawyers when they think there is a chance of being nearly reached. This often takes several days. In the meanwhile the cases ahead of the Bowring case have been dragging out their slow and weary performance on the court stage. Matters of fact that should have taken five minutes to bring out by the present usual laborious system of proof, have taken two hours.

Argument of counsel on abstruse questions of law have worn and confused the jury and the clients, who have become exhausted and impatient.

The clients and witnesses may have been sitting, trying to understand and becoming more and more mystified.

The dealings of open-handed Justice ought to be plain, prompt, and understandable; instead to the spectator she seems a mysterious jade with no understanding of everyday life. She keeps them waiting there without reason. If the case is marked ready it ought to be ready. The business man feels that Justice is extremely tardy in keeping her appointments.

His natural reverence for abstract Justice prevents him formulating these thoughts, but he continues to wonder. Not understanding the cause he becomes dissatisfied and his experience in court leaves a profound contempt for the system of jurisprudence. He thinks that if any man conducted his own business on the method and plans on

which the courts are being run he would soon be bankrupt.

"Why," he says, "does not the court get in an efficiency expert on this calendar evil and have it arranged on a business basis?"

During the days the case has been on the calendar the lawyer has had to hold himself in readiness to try the case. The managing clerk has been sending out for his witnesses. They have been served with subpœnas and paid their fees to come to court on the day the case was first marked ready. They arrive and are told to come again the next day. They also have a respect for the court and are glad to come to do their duty and tell the truth. The truth is mighty and will prevail; but in court she can only speak through witnesses. Unless the witness be treated with consideration it would seem that she will not speak very willingly.

In place of having them return and return again, some system soon will be devised of giving them timely notice when the case is to be reached. Exhausting the patience of the

men who are the props and mainstays of truth does not seem reasonable, and after a few visits to court they are not anxious to come again. If possible they will escape the process server.

A man who has witnessed an accident to a woman by a street car, in spite of his humanitarian instincts will run around the corner for fear of being called as a witness. The man who hears at night the call of "Police! Police!" in the street, jumps out of bed and begins to put on his clothes, but thinks better of it for the same reason. If a man is in a taxicab that is run into by an express wagon, and the resulting suit is brought by the taxicab company for $110 damages, he may have to attend court five separate days as a witness and the case may not be called. He has to leave the State to avoid being annoyed by the subpœna server, who dogs him at his club and at his home. The witnesses have lost their time and their patience.

Each lawyer knows this and a petty game of playing for delays and adjournments some-

times goes on. Suppose there is a good claim which nevertheless the defendant denies, knowing how lengthy and wearisome is the game of reaching a case, he often succeeds for years in preventing its collection. The game is simply to tire out the opponents, clients, and witnesses. A clever and unscrupulous lawyer can throw so many obstacles in the way of a plaintiff that, unless he have a strongly developed streak of obstinacy, he will give up in disgust or be glad to compromise.

Unless both sides are anxious to be reached it is practically certain a case will be adjourned two or three times. A sworn affidavit is presented with the doctor's certificate that the client or witness is sick, or the sworn statement that a witness can not be found, or that the lawyer is engaged in the trial of another case. The excuse may be valid and the reasons may be sound, but the adjournment of the day for trial occurs again and again. This is one of the causes for the complaint as to the law's delay. Naturally

calendars have to be made and called. Cases have to be tried and others have to be reached in order, but at least there should be sufficient and intelligent planning of the order.

It seems rather a weak answer to say that no one can tell how much time will be occupied in the trial of a case. If any systematic or scientific method of regulating the calendar were devised, one of the evils would be avoided.

The very call of the calendar in some courts occupies to an unreasonable extent the time of the judge who might as readily be engaged in the real work of the court. The aggregate value of the time of the judge, the lawyers, the witnesses, and the jurymen who have all been sitting about waiting, for the call of the calendar is, for one hour's delay a large sum. The waste might be saved by an intelligent bureau for the administration of court business which would have absolute control over all calendar practice.

That the judge should delay a whole court-room full of people by being late in opening

court should not only be a matter of apology, but is reprehensible to the extent of being multiplied by the number of people he has kept waiting. On the other hand, the usual course of proceeding being apparently with the object of dragging out the business of the court, makes the tardiness of the judge seem only an incident.

Fortunately there are few attorneys who make appearances in court merely for the sake of adding another item on their bill to the client, and the real delay in reaching a case is due more to the confusion of administrative methods; until some more practical system is devised it will continue. Then witnesses and clients will not be loath to go to court.

The weary work is finished, all the tiresome facts have been gathered, and the rehearsals have been had. The play is written, the parts are cast. The disappointments and delays have been forgotten, the months of preparation have passed. At last the bell for the performance rings and the case is finally to be tried.

VIII

PICKING THE JURY

VIII

PICKING THE JURY

THE clerk calls the case again for trial, not this time to inquire whether both sides are ready but to announce that it is about to begin. The lawyers, their assistants on both sides and their clients move forward to within the rail. There is a certain amount of commotion as they arrange their papers, their portfolios, law books, hats, and coats, and take their places at the counsellors' table opposite the jury-box. In the dignified courts in this country this rather uncomfortable disposition of overcoats and hats is arranged in an adjacent room. The opposing parties in the battle to be enacted are now facing each other. Matters become at once

more serious and formal. What was once avoidable is now inevitable.

The stage has still in a measure to be set. Twelve important actors are to be selected. The jury have not yet been chosen. The jury for the sake of comparison take the part of a Greek Chorus, a silent one it is true, until the final word is to be said. They nevertheless are as important and essential a part of the drama as the Chorus, without which in the background no tragedy or comedy was complete.

No curtain divides the theater and the arrangement of the stage goes on before the eyes of the spectators. The choice of the jury constitutes an interesting part of the performance. In this preliminary play the lawyers having important parts, their manner, bearing, tones of voice, their courtesy or discourtesy, repose or nervousness, are watched and unconsciously noted by the jurors. As the jury-box gradually fills, even the slightest idiosyncracy may have some effect on the outcome of the case.

Trial lawyers are careful of their actions even before the case is called to trial. It may be that among the spectators who have been sitting beside the lawyers in the back of the room, waiting for the case to be called, are those who may afterwards be called as jurors. Any affectation of manner or pomposity is quickly detected.

Experienced lawyers immediately they are observed by their tribunal, fall into the parts they are to play during the trial. One lawyer may be jovial and radiate a cheerful confidence. Another has a superior, detached, and academic air which promises a sarcastic cross-examination. Yet another takes on a blustering, brow-beating, intimidating manner, a kind of overmastering virility. Each kind has its own particular advantages, according to the nature of the parts to be played. The most efficient is the manner of the lawyer who is direct, business-like, and consistent with his own personality.

As on the modern stage, there is a return to simplicity of acting. Naturalness and a

constant regard for actuality is the only safe rule. Simplicity and naturalness, even if studiously affected, usually prove convincing. The aim is toward consistency and a non-elaborate manner.

Above all the lawyer remembers that the jury admire the good fighter, and it is with a certain obvious subtlety that one successful advocate in New York lets his assistant carry his coat, books, and papers, but he himself always carries his hat—a derby, by the way, for a high hat would be over important. The great man knows that the jurors are aware of the importance of the occasion and that their eyes will follow his every movement. As he walks up to the counsel table and deposits his derby it may well become a gage of battle.

The clerk at the side of the judge's desk begins turning a large hollow wooden wheel; within it are cards on each of which is written the name of a juror who has been served by the sheriff to attend on the panel for the trial term of the court. The number sum-

moned naturally is larger than the twelve needed for any one case. Often those who have to attend at a term of court sit about with nothing to do until they are actually drawn on a case, although they receive their fees for attendance. There is the story of the ignorant workman who was serving his first time on a panel.

"Why," he said, "I was sitting around all day worryin' about my lost working day. If I'd known I was getting two dollars for doing nothing I might have been enjoying myself."

The clerk puts his hand into the wooden wheel after the names have been well mixed and draws out one card after another, calling the names aloud until twelve jurors have been called to the box.

To the entirely new spectator there is a certain mystification about this drawing of the jury from the wooden drum with the handle for turning. To the initiated it may seem rather humorous, like the shuffling of the cards of justice, the drawing from a hat,

or the turning of a roulette wheel. It is, however, significant of one of the great principles of Anglo-Saxon law, and that is a trial by a court of average men selected from among the ordinary citizens and drawn on the particular case by chance.

As each juror's name is called he comes forward and his appearance is not lost by counsel. He takes his seat in the box, the juror being first called is known as Juror No. 1, and by this chance, if he remain in the box, he ordinarily becomes the foreman of the jury. In cases of special juries, as of the Grand Jury, the foreman is chosen by selection. The successive jurors are respectively numbered according to their seats beginning from right to left facing them. Here it may be noted that some lawyers in addressing questions to the individual jurors are careful to remember to call them by name, realizing that no one likes to be known by a number. Instead of referring to him as Juror No. 7 or No. 9, he addresses him as Mr. Sullivan or Mr. Schmittberger.

The twelve men being in the box the counsellors begin to examine them as to their qualifications. On a small board bound lengthwise by rubber bands, or stuck in grooves are the cards drawn from the wheel and arranged according to the number of the seats, and containing the names, addresses, and occupations of the gentlemen seated in the box. There are two means of removing a juryman. One is by challenge for cause, *i.e.*, that he is shown to be unfit or prejudiced, and the other is what is known as a peremptory challenge which is practically the same as saying one side or the other does not like the man's looks. There are connotations about the word challenge which are essentially dramatic. It implies a battle, a duel, a tournament.

It is difficult to ascertain exactly what principles govern the successful examination and selection of a jury. In Massachusetts and in certain important cases in New York, the whole panel of jurors summoned for the term of court have been investigated by

detectives in order that the lawyer might have information about who was to be rejected or accepted as a juror to decide the case. The propriety of doing this may be questioned and the ordinary case could not bear such an expense.

Nevertheless there is a possibly sound reason for obtaining such information. Given a man's condition in life, his habits, his occupation, his church, his associations, his politics, and given on the other hand a certain state of facts, it is nearly ascertainable how he is going to decide those facts. If a man has always been a rent payer and has probably had continued trouble with his landlord about repairs and a feeling of resentment at the regular recurrence of rent day, is it not natural that he is going to be somewhat prejudiced against a landlord in a dispute between landlord and tenant? or on the other hand can a man who is one of the unfortunate owners of real estate, and who having paid taxes, interest, insurance, repairs for removal of tenement house violations, and with fre-

quent vacancies, really be absolutely just? If a juryman is a Jew, a Catholic, or a Baptist, there will probably be an innate sympathy for his co-religionist. The law does not recognize this unless the juryman is honest enough to confess a prejudice. The soundness of the Anglo-Saxon jury system is based on the theory that there is not one juryman but that there are twelve and that among twelve there will be an average between the landlord and the rent payer, between the Baptist and the Catholic.

The counsel ordinarily selects the jury with observation and common sense as his sole guide. The customary question asked jurymen, whether, given such and such a state of facts, "Do you think you could render a fair and impartial verdict?" is manifestly absurd to the juryman. Every man believes himself to be perfectly honest and just. It takes a strong character to say, "I couldn't be fair." As a matter of fact such a man ought to be kept on the jury rather than let go. As a juryman once said

to a lawyer after the case: "Why did you excuse me when I said I knew the other lawyer? You wasted your challenge; he wouldn't have let me stay. I knew him too well."

The extent to which the examination of the fitness of jurors may go is in the discretion of the court. The two extremes are represented by the methods in the English courts where the judge exercises close supervision over every question in the selection of the jury in what would be considered in America an arbitrary and unjustifiable manner, and the extreme liberality at criminal trials in this country. The difference in time is often between that of a few minutes and a few weeks.

Naturally the challenge for cause may or may not be allowed by the judge—the form being, "Your Honor, I ask you to excuse Mr. Smith,"—because the lawyers are more careful in attempting them; for if they are not allowed the juror challenged may be small-minded enough to retain a grudge against the

counsel. The sure challenges are the peremptory ones without any cause stated or reason given. The number of peremptory challenges for each side is usually six. As soon as a juror is challenged he steps out of the box and the clerk draws a new name from the wheel.

It is very much as if a player were dealt a hand of twelve cards, and under the rules of the game each side can discard and draw six times from the pack six single cards to improve his holding. The hand, however, is not only his but his opponent's, who may likewise discard and draw six cards when the first player is satisfied. When the second player is through the first may again discard any of the new cards the second has substituted, provided, of course, that six drawings have not been exhausted. This game of chance is always played with an eye to creating a favorable impression on the jury and may be politely finessed to the extreme.

"Mr. Merriweather, do you know the defendant in this case, Mr. Jacobs, or his

attorney, Mr. Jenkins, or his assistant, Mr. —er—the young gentleman on his left?" is the usual form, delivered with the utmost urbanity. It means very little, but perhaps helps the lawyer to identify an antagonistic juryman and to obtain their answers, which are almost uniformly in the negative. It is obviously desirable that the juryman, as a judge, should not be a friend of the opposite side. From the manner of the man in the box, as he answers, may possibly be inferred his general disposition, and all further questions have this purpose in view. So the attorney for the plaintiff proceeds throughout the twelve before him, and he may say at any time, "Your Honor, I excuse juror number so and so."

Usually he examines the whole twelve before "excusing" any of them, and when doing so many lawyers turn from the box to the judge as they say, "I will excuse numbers four, five, and eleven." Frequently those remaining do not realize why their brethren have been dismissed. A slight

bewilderment may pass across the faces of all, as a man here and there, under the beckoning finger of the clerk, rises to give up his seat.

Opinion differs as to the extent to which challenges should be exercised. Some trial lawyers are chary in using them, being anxious to appear frank, trusting and willing to accept the judgment of any decent citizen. Others are meticulously insistent and exhaust all their challenges. The first attitude is the one of saying:

"I have such a fine case, so honest and just, that it is impossible that any fair-minded man should decide against me. Therefore, I shall not insist on these minor points of interest or prejudice. You are all open-minded. I will leave it to anyone." The second attitude was explained by one lawyer who always put his hand to his chin, looked deeply and inquiringly at the jury, and said in an important voice:

"I challenge jurors numbers 6, 8, 9, and 11, or, 4, 5, and 12." When privately asked on

what theory he proceeded in his earnest selection which seemed to imply so wonderful an insight, confessed to no theory at all except the plainly human one that he believed in using up all his challenges simply because it made the other jurors, who remained in the box, feel better and more selected. But the main purpose of selection is to secure a fair and intelligent jury.

Not infrequently one side or the other really wishes to get rid of the best men and willing to take the risk that this will not be apparent. In a real estate case, counsel for the plaintiff not having a strong case succeeded in eliminating every man who had ever owned or who had ever had the slightest experience in houses or property. It was a bold confession that no one who understood the case would decide for him. In railway accident cases, the plaintiff, who asks damages against the company, will often excuse so far as he can, every juror who appears well-to-do or a man of property.

A prominent New York lawyer, when a

young man, had defended a case brought against a corporation. The plaintiff and his attorneys were Jews, and the jury-box when first filled was seven-twelfths Hebraic. Counsel for the plaintiff immediately excused the five Gentiles and when the corporation's lawyer stood up, not a man in the jury-box was of his own race. He accepted them. The trial went on, and it appeared that the plaintiff's claim was very weak indeed. At last counsel for the defendant had to sum up and he concluded in this way:

"Gentlemen of the Jury: The plaintiff hopes to win this case not on the law, nor on his evidence, nor on any consideration of justice. He hopes to succeed because of the simple fact that he is a Jew, his lawyer is a Jew, and every one of you men are Jews." With an expression of faith in the sense of justice inherent in the Jewish race and of confidence in the verdict, the attorney for the defendant sat down. The jury decided in his favor.

Such boldness, when successful, is often

rewarded, but it is of course inherently dangerous.

Skilful counsel will succeed in ingratiating themselves from the very beginning, but they will endeavor to do so only with the jury as a whole. Nothing is more unfortunate than to bestow attention upon a particular juryman: that is to flirt with a juror. If he has not yet been sworn in with the rest and the opponent sees it, he will certainly get rid of him. If he remained, he would very probably be regarded with suspicion by his chosen associates. Should the counsel think that one man in the box is favorably disposed toward him, he wisely leaves him alone and hoping that the other side will not notice it, devotes himself the more earnestly to the others.

The jury is at last selected. The challenges have been exhausted. Both lawyers look as though they were pleased. The judge is informed that the jury is satisfactory, which is, of course, an euphemistic term. No jury is ever entirely satisfactory to both sides,

but it is a polite way of saying it is the best they can get under the circumstances. The judge stops trying to balance his check book and looks up at the jury. The attendant motions them to their feet. They hold up their hands. The judge also rises.

"Gentlemen," he says, "Do you each and all of you solemnly swear to well and truly try the case of John Smith against Thomas Gregory and a just verdict render according to the evidence? So help you God." They do not answer, but they sit down.

IX

OPENING THE CASE

IX

OPENING THE CASE

THE jury is chosen, sworn, and sitting in the jury-box. The judge begins unfolding the papers of the case so that he may read the pleadings. The actual trial of issues is about to begin. The court attendant has taken the jurymen's hats and coats, another attendant has shown spectators to their seats and politely as possible suppressed the young law clerk who does not see why he could not go up to the judge and ask him what became of the case of Jones against Allen that was on the calendar last Thursday and should have been on to-day, or ask if "His Honor decided that motion in the case of Meyer against Cohen." The doors of the court-room are closed. The attendants

go about looking for whisperers and saying, "Cease all conversation." The lady client is interrupted in telling her lawyer that she thinks the judge has a kind face, but that she does not like the looks of the man in uniform standing next to him, or vice versa. Gradually the court-room quiets and a spirit of expectancy prevails.

But the actual taking of evidence and the hearing of testimony is not yet. Now comes what is known as the opening. So in the tournament, the armored knights entered with a blast of trumpets, their names and titles having been called, and it was customary for them to ride once or twice around the lists to let the judges see their armor, their weapons, their mounts, their trappings and accoutrements, or they might even try a tilt or two at one another. The introductory speech of counsel is somewhat in the nature of a parade or a preliminary skirmish. It may also be compared to the prologue spoken before the beginning of a drama. The speech with the vivid brevity, so

common in legal terminology, is called the opening.

The object is to show to the judge and jury what the drama is about. The secondary object is to arouse interest. Immediately after the opening comes the evidence, which is usually bald, fragmentary, and disconnected. It might be impossible for the jury to understand the relation of one bit of testimony to another. Take a simple case such as a suit for the failure to pay a bill at a dry-goods store. One witness testifies to the sale, another to the packing of the goods, another to the delivery; a receipt is introduced in evidence. Each one would not tell a connected story. The opening outlines the facts and makes the evidence understandable. It also has the function of an appetizer. This may seem a trifle unnecessary. But let us take an illustration. A whole case may depend upon a deed. If the paper itself were put in and read to the jury without explanation they would be bored. One witness is to tell this part of the story,

another that, and the missing link of the chain may be supplied by the deed. The jury are not to be mystified before their interest is aroused. Are not the lives, property, or reputations of particular men at stake? The ordinary man and even more the average juryman has far too strong a sense of responsibility to be bored if truly he can understand what it is all about. The function of the opening is to tell him.

As the counsel begins opening every juryman leans forward and watches him intently. They feel their responsibility as officers of justice and there have been few complaints of their falling asleep during the trial. The jurymen have come to know the names of the opposing lawyers and the faces of the clients, if they have been pointed out during the examination of the jurors, but nothing more. Are the jury to hear a story of bitter resentment or of passion and crime, or a calm demand for the payment of a debt? The opening will show.

Did the plaintiff during years of effort

build up a business and take the defendant in as a partner only to be defrauded by him? Plaintiff's attorney will indicate the years of effort briefly, but impressively, before sketching the manner in which the defendant stole from him by fraud the fruits of his labor. When the plaintiff then testifies that in 1890 he opened a small store in Fourteenth Street, moved in 1896 to Twenty-third Street and thence in 1916 to an up-town street off the Avenue, the dates will sink into the jurors' minds and they will portray for themselves the twenty-six years of painstaking effort. No eloquence then could rival the effect of the witness's slow, bare recital of his progress. Yet without counsel's prologue what could be more dull than the naming of street numbers and dates?

The matter of the testimony may be interesting, but unless the witness has a rare gift of expression and a sense of the picturesque, the way in which it will be given may be dull and plain. But at this point the little keen-faced lawyer for the other side jumps

up and interrupts: "I object, your Honor; what difference does it make where he lived in 1890, whether on Fifth Avenue or Mulberry Bend? What we want to know is what he is suing for now." And the court will probably rule with him and keep the plaintiff down to more relevant facts.

Some of the important answers may be yes or no. Counsel in such a case supplies the color and gives an appearance of life to what is actually alive enough, but which alone would seem dry. Even if so famous a character of fiction as "Becky Sharp" came into court and only looked her part with what intense interest would we not hang on her testimony, though it consisted of no more than "Yes, I did"; "I never saw him before." We should be fascinated by this bald statement because Thackeray had interested us so enormously in the lady. The air would be electrified by the force of her personality. Without a previous introduction, however, we might be so lacking in discernment as to find her, in appearance and voice, no more

unusual than the average witness who goes on the stand.

Thackeray not only created Becky Sharp; he also created our interest in her. Similarly the lawyer may create an interest in his witnesses, some of whom may be personally every bit as extraordinary as any character in a novel. If a witness be actually commonplace, there is all the more need for making him vividly human; if he be so colorless that nothing could be made of him personally, he may acquire interest through the class to which he belongs, for classes have a personable color more deep than the almost colorless individual.

To induce the jury to visualize the story and the characters, the highest literary gift may be brought into play. The lawyer is limited as to time and the description he may employ. He has, however, his voice and expression: an actor's tools. But again the rule of simplicity and naturalness should apply.

The opening speech is a prologue and it

does not argue. Counsel will not be permitted to argue his case in his opening, for his opponent will object and the Court will often say, warningly, "Counselor, you are summing up." This limitation, however, is in reality an advantage, not merely because it applies to both sides, but for the reason that no lawyer with any sense of dramatic values would anticipate his *dénouement.* Argument is apt to be chilling unless the decision sought for can be discerned, however dimly, without it. And how are the jury to frame their decision before the evidence has been presented? The jury should be interested in Miss Becky Sharp and prepared to understand her testimony, but, before they have heard her story from witnesses who know, they will not be favorably impressed by urgings that she was wronged or badly treated.

There is usually leniency in regard to the length of the opening, because it is well recognized that few witnesses can tell a connected story, or tell it well. From the

old French story of the lawyer who began *avant le création du monde*, and the judge who asked him to pass on *du deluge*, down to the usual modern method of nagging the lawyer into stating only the skeleton of the action, there are various degrees of eloquence, varying naturally according to the importance of the case.

A wonderful thing the prologue may be in its restraint and picturesque vividness, and, not least, in its clarity. Confused business dealings may be described so that important sums, figures, and dates will be remembered and recognized when they appear again in the evidence. Counsel, for the time, occupies the center of the stage; his course is in his hands to make or mar. He reaches the end of his speech, bows, and the first witness is called.

Before the testimony begins the judge looks at the defendant's counsel and asks him whether he wishes to state his defense. There is a different practice in this regard in different courts. Some insist that the

defendant ought to tell at once what his side is about, others that the defendant should wait until the plaintiff is through all his evidence and has rested; then at the beginning of the defendant's case the defendant's lawyer opens and makes his introduction.

The difference between these two manners of proceeding is so essential that it may be explained. On the one hand the lawyer feels that he should not be compelled to give away what he is going to do, how he proposes to meet the attack, whether he will lie in ambush and snipe the plaintiff as he comes on or intrench behind a rampart and meet him with the full force of his battery of evidence. He may be planning to make a sudden sally after the plaintiff has shot his arrows and exhausted all his ammunition. The lawyer feels if he tells his plan of campaign he loses the advantage of generalship.

Suppose a simple case: The plaintiff is suing on a long account for a bill of goods which will take a long time to prove. The defendant has a receipt in full showing

payment. On the theory that the defendant need not disclose his evidence in the opening, he may sit still with the receipt up his sleeve, let the plaintiff open and call his witness, the evidence may drag itself along with the usual motions and objections, and after the plaintiff rests the defendant opens to the jury.

"Gentlemen," he says, "this is a simple case. The plaintiff claims he sold the goods and the defendant did not pay for them. I propose to show you that the plaintiff was not telling the truth. I made him prove to you that he sold every item in the bill because I wanted to show you how untruthful he is. My client, the defendant, not only paid for the goods but I can show the receipt in full signed by the plaintiff."

To the layman this is absurd. The defendant should have shown the receipt in the first place and all the waste time of the trial would have been saved. "No," says the technical lawyer, "if I had disclosed my evidence before, the plaintiff would have framed his evidence to meet the situation."

The modern view is otherwise. In France, for instance, no paper can be offered in evidence on a trial unless it has been shown to the attorney for the other side beforehand and everyone has had a chance to examine it. Indeed, this exhibition of original documents is conducted in so open and honest a fashion that it is customary to send all the original papers to the other side without even taking a receipt or retaining a copy and in the whole history of the French bar the loss of such a paper has never been known.

It seems more practical and sensible that the lawyers for the defendant should be required to state the nature and detail the facts of his defense. It is the difference between the old idea of trial and the new. The first was an imitation battle, the new idea is not that it is so much a struggle as an investigation of the facts. If the plaintiff wants to meet the receipt he can make a counter-attack or explanation in the rebuttal and explain how he came to sign the receipt in full. The judge and the jury feel the

necessary element of the trial is to arrive at the facts and that the planning and methods of charge and counter-charge are not so significant. The old conception of the trial as a battle is disappearing.

The opening by the defendant at the beginning directly after the plaintiff has finished his opening and before a witness is called, makes the trial simpler to the minds of the jurymen who are to decide the facts. The pleadings are supposed to define and state the issues but as they are usually technical they have become not sufficiently pliable. The defendant by his answer denies merely the facts stated in the plaintiff's complaint in the paragraphs numbered six, eight, and ten. The defendant on his opening should be compelled to make plain to the minds of the jury what he intends to show. He should take the position of a plain business man who says, These foolish people imagine they have a claim against me. They have nothing of the kind.

The plaintiff says that he understood the

contract to be so and so and that acting on that assumption both parties did certain things and know the defendant with evil intent and wrongfully forgetting the duty he owes to keep his word refuses to live up to his agreement, therefore, "Gentlemen, we have been compelled to come to court and bring this action and we shall show you gentlemen facts from which you must find a verdict in our favor." The defendant then arises and says:

"Gentlemen, we are going to show a letter that contradicts all this." Oratory has little place in the opening of the defendant.

The judge has been, during, the two openings, attempting to keep the two counsels down to the facts which he thinks may be proved and from wandering too far afield. As quickly as they are both through he says, "Call your first witness," and with trepidation the witness takes the stand.

X

THE CONFUSED WITNESS

X

THE CONFUSED WITNESS

THE whole question as to witnesses is whether they shall be allowed to tell what they want or what the lawyers want. As they are both in the court-room they must abide by the rules of the court. That is the trouble: the rules are against the witness.

When the witness goes on the stand for the first time the court attendant asks her to raise her right hand. She does so and tries to sit down in the witness chair so that she may feel a little more at ease. "Stand up," says the officer. The judge looks at her inquisitorially over his spectacles. She tries to smile and regains her feet. "Raise your hand," says the judge. The delightful and sanitary custom of kissing the Bible

has been done away with. Even the habit of resting the hand on the Book is disappearing and in many courts a Bible is hard to find.

The lady, in the confusion of appearing on a stage for the first time and standing on a raised platform before an audience, holds up her left hand. The court attendant jumps at her. The judge has seen the same performance many times before and hardly notices the *contretemps*. By this time she is confused and ruffled and after hearing something murmured about the truth, the whole truth, and nothing but the truth, she sinks into the chair and begins in a very uncomfortable frame of mind the ordeal of giving testimony.

What she wants to say, what she ought to say, what she was told to say is all gone. The jury and the judge understand and feel sympathetic but the rules of the court do not permit them to be polite, and to ask her to take a more comfortable chair, to have some tea, whether the children have had any

after-effects of the measles, or to take off her hat and stay a while. She knows she has to stay and that she is not going to enjoy it.

She is the important witness who was riding in the car at the time it crashed into the grocery wagon. She is honest, of average intelligence, and wants to tell the truth. She is asked:

"At the time of the accident, where were you?" She says that she was in the car going up-town to see her married daughter whose children were sick with the measles and she was in a hurry. The lawyer moves to strike out the latter part of the answer. The fact that she was going to see her daughter, that the children had the measles, and that she was in a hurry are not relevant and have nothing to do with the case. The only relevant fact is that she was in the up-town car.

She was sitting four seats from the front and thinking the car was going very slowly and the children would be asleep before she

got there. It is immaterial that she was thinking about her grandchildren or the measles, or that she was thinking about the car going slowly. The real question is how fast the car was going.

The reason for the rule of evidence is that the court always wants to know not what she thought, but what she actually saw. She will not be allowed to tell what she thought or what she told her daughter after the accident. The daughter can not be called to the stand to testify what her mother told her, when she reached her house, about what had happened. Newspaper accounts of the accident may not be allowed in evidence, nor what the policemen reported on the accident, because he arrived afterward. Anglo-Saxon law holds the proof down to what was actually perceived by the five senses. The court makes up its own mind from these perceptions and the facts themselves. It does not want to hear what someone thinks, or what the witness believes or concludes, but only what he perceived.

There is much to be said for and against this rule on both sides. A broader method to the lawyer seems shockingly loose and slipshod. The rules of evidence to the bystander seem an inhuman farce. The first allows an atmosphere to be created from which the whole truth may be reached. Would not an ordinary person, if he wanted to find out about the accident, read the newspapers, find out the police reports, ask what a witness thought, what that witness told someone else about the accident afterward? Is she not now giving someone an account of the accident?

Psychologists agree that no one can accurately narrate their perceptions and what happens before their eyes. Moreover, the tests performed on school and college graduates in regard to their powers of observation have shown the fallibility of human perception. The failure to perceive, plus the failure to remember, plus inadequacy of language, makes all testimony unsatisfactory. People of little education are still

less able to either see or explain. The only safe way is to obtain a composite photograph of the witness's mind and of the thoughts that arise from the original perception, a continuation of impressions.

Judges or juries never determine cases by first deciding which witness is telling the truth or at least the exact truth. They take it for granted that both sides are lying somewhat; that no matter how well they mean and how hard they try, all witnesses are incapable of telling the exact truth. The unfortunate part of the law is that this is not officially recognized. There is a hypocrisy in not recognizing the inadequacy of human eyes and ears to grasp even simple concrete facts. A timidity exists that will not allow the admission of human imperfection.

The proof of this is that when three witnesses go on the stand and describe a thing as having happened in the same way, immediately there is a strong doubt in the mind of the jury about the whole case. Suppose the question of the time a crime was

committed arises and the defense tries to prove an alibi by showing the defendant was in a saloon at that time. There may have been three witnesses who really saw him at the same time. One witness comes on the stand and says 3:10, the next witness says he saw him at 3:10, and third says the same. The jury conclude that the story has been made up.

Yet suppose the first witness says he saw him sometime after lunch, and the second that he remembers seeing the defendant in the saloon sometime that day, but he is not sure whether it was in the morning or the afternoon, and the third witness says that he saw him during the week, but that he does not remember the day, whether a Thursday or a Friday—it is probable that the defendant will have a much better chance of succeeding with his alibi.

The lady in the car could not remember the time of the day, except that it was near the children's bed time. She had heard the crash and seen the wagon turn on to the

car tracks. With a great many objections she finally gets to the point of the crash.

"Did you see the car hit the wagon?" "I object to that as leading," says the other lawyer. "It is leading and suggestive." Technically he may be correct, but if the judge has common sense he overrules the objection.

The proper question would be: "What happened next?" The witness, however, might remember the paper bag of oranges she was carrying to her grandchildren and instead of telling about the accident begin to describe how she dropped them on the floor. Leading questions are necessary in nearly every case. The reason that they are objectionable and ruled out is, that the judge and the jury ought to hear not the lawyer's narrative of the facts, but what the witness actually remembers.

A witness on the stand appears at his worst. If any one from real life were suddenly thrust unprepared and unlearned in theatrical art upon a stage the incongruity

of the situation would be appalling. Yet the witness is thrown into new and strange surroundings. It is a portion of the reality of life shown vividly against a conventionalized background. The judge and jury in a vague manner understand this. The lawyer producing the witness feels this and elicits the testimony in a soothing manner.

The objects of cross-examination are as follows. The first is to prove that the story of the witness is not true, and the other is to bring out something new. The opposing counsel often forgets the purpose of his cross-examination and by attempting to bully and frighten the witness, usually either by sarcasm or a doubting manner, accomplishes very little. Not one cross-examination out of five hundred amounts to anything. The judge has heard many and he has little hope of their being of much interest. The jury make so much allowance for the witness being frigthened on the stand and for the fact that she is in the hands of a clever lawyer, that they are not much

impressed even if she contradicts herself or is proved mistaken. At best it is only a mistake, not a deliberate lie. The lawyer thinks he owes a moral obligation to his client and to himself to cross-examine. He is compelled to go on. There is a musty tradition of the law that a trial without cross-examination is not a proper trial. It is a legal fetish and one of the things that is done. The judge expects it, the jury expect it, the client expects it and the public.

The client pays his money and he ought not to be disappointed. If it were omitted altogether, the judge and jury might not feel the loss so bitterly. Perhaps they might prefer it and the question for the lawyer is whether it is better to satisfy the client or the jury. In this quandary the lawyer may forget that the main point is to win the battle. When the case is lost the client does not care at all how brilliantly the lawyer looked, acted, or fought.

If the lawyer reasons he will say:

"If the object of my cross-examination

is to show that the witness is not telling the truth, have I much chance of getting him to confess the fact?" The witness knows something about perjury. He is afraid and he has heard about those pitfalls of cross-examination. Does the lawyer remember his own hopeful son and how only yesterday he could not get him to admit stealing the cake even with the prospect of immediately impending punishment? Only that little rim of chocolate about the ears was the proof. Even the dear little child, who is not as intelligent as the witness, will not admit that he was untruthful. But still he goes on cross-examining.

If the witness is finally shown a paper which he or she signed when the investigator of the railroad came to see her, and in which she said she was sitting on the sixth seat, there is not such a great deal to be proud of.

"Ha, Ha," thinks the lawyer "at last," "didn't you just now say you were sitting on the fourth seat?" "I don't remember," says the witness. "What," thunders the

lawyer, "you don't remember; then your memory is poor. I will read you what you said on your direct examination," and he does. "Now which was it, the sixth or the fourth seat."

The other object of cross-examination is to elicit new facts. This is a dangerous risk for the lawyer, and unless he is sure of his ground, he had better not take it. He will do better to let his own side tell the facts than to bring them out through an unwilling witness who is on his guard and thinking the opposing lawyer is trying to trap him.

The mistake that most lawyers make in cross-examination is to ask the witness to repeat what he said in his direct testimony. Telling the same story over again merely accents the facts in the minds of the jury. The lawyer asks:

"You say that you saw the driver whip up his horses when the car was a block away." The lawyer may doubt the truth of the statement but the mere repetition of the words affects the memory of the jury. Un-

less he has a distinct object in going over the testimony, either to show the direct contrary strongly, or the fact that the witness has learned the testimony by rote and that the repetition is in exactly the same words, the lawyer would do better to desist.

Strange as it may seem the rules of evidence are actually based upon common sense. The ordinary experience of mankind gave rise to the rules of evidence, but the difficulty is that the further experience of civilization is giving rise to new rules which are not consistent with the old. Nevertheless the present rules when reasonably applied are fairly good. The question really is whether there should be any at all.

Accepting the fact that there should be rules they are based on two principles; the first is that only something which has to do with a case can be proved and second that it can be proved only in a safe and reasonable way. It may seem impossible to the lawyer and equally to the laymen to state the rules of evidence in simple language. But the

principles of common sense will govern in the end, as they have in the past, notwithstanding they have been hidden under a mass of verbiage, ancient forms, and obsolete customs.

The theory is that justice wants the highest and best it can obtain, the court insists on the two principal rules; that evidence must be the very best that can be obtained and must be brought out in the safest, clearest, and most authentic manner.

Take, for instance, the rule that conclusions of the witness are not allowed. If the court considered as evidence that the testimony "the defendant brought the goods and they were delivered," and the defendant came on the stand and said, "I did not buy the goods and they were not delivered," the court would have before it merely two contrary beliefs or conclusions. It would be a case of "Katy did, Katy didn't."

The rule of evidence is plain that makes it necessary for the plaintiff to show where he saw the defendant, what was done, and what was said or written by the two parties.

If the question is as to the delivery, it is not enough for the plaintiff to say "I delivered the goods." The court must have proof of the history of the goods. The driver of the wagon must be called who can testify where he drove, what package he carried, and what was done with it when he reached the house.

The whole subject of expert witnesses is not so complicated after all. They are merely persons of exceptional experience who are allowed to testify as to something of which they know nothing. They may have never seen nor heard the facts in dispute but because they have had so much experience on similar facts they are allowed to say what they think of facts produced by eye witnesses before the court. As conclusions and opinions may be various, there is at times a great variety in experts, and because the very name of experts implies technicality, there is a feeling in the minds of the jury and the public, that the testimony of experts will befog by a mass of non-understandable terms.

The doctor who testified in a case in which the plaintiff suffered a sore back and had seventy-five dollars damages from the jury is an example. He said:

"The plaintiff was suffering from traumatic sacro-illiac disease, traumatic sinovitis of the knee and wrist and from traumatic myositis of the muscles of the back."

In reality the testimony of expert witnesses is very good evidence. If it is given in plain and understandable English and the jury think the expert a clean-cut, sensible man, it is just what the jury want to learn. An expert's method of reasoning about the facts in evidence is the same as that employed by the jury in the jury-room. It is merely an opinion; for on the opinion of the jury, based on the evidence depends their verdict.

While the witnesses are being examined, called to the stand, sworn, being excused, and being cross-examined, there occur numberless incidents of the trial known as the objections, exceptions, and motions.

XI

THOSE TECHNICAL OBJECTIONS

XI

THOSE TECHNICAL OBJECTIONS

THESE are the stage tricks and little incidents that give variety to the performance. No drama would be complete without a few diversions. So far as the drama itself goes, they are of no great importance except to give pungency and interest to the action.

The lawyer asks an apparently good question. "I object," says the other lawyer, "on the ground that it is incompetent, irrelevant, and immaterial." The judge has to rule. He may not exactly have heard the question. The stenographer reads it again. The other lawyer leans forward in a frenzy of fear lest the question be ruled out. He begins to argue.

"The question is perfectly proper; the witness ought to be permitted to answer it." "No," says the other lawyer, "it is improper in form, calls for a conclusion, and should not be allowed." The judge looks puzzled. "Read that again," he says. The question is, "What kind of a cow was it you saw in the plaintiff's garden?" "I still object," says the lawyer. "The witness has not been shown to be an expert. If my learned friend is going to attempt to qualify him as an expert, I desire an opportunity to cross-examine him concerning his experience in cows." "Not at all," answers the lawyer. "The question is entirely proper and I stand on my legal rights." The judge hesitates; if he does not rule correctly the lawyer will take an exception and the Appellate Court may not like it. So he says, turning to the witness, "You may answer, but I will reserve the question and decide it later on a motion to strike out." "I except," says the lawyer. The jury look relieved. The witness straightens up, the opposing lawyer

sits back in disgusted contempt at such a loose method of procedure. "Well," says the witness, "it was a red cow."

This may go on for some time.

"I move to strike the answer out," says the lawyer; and the argument begins all over again.

Throughout the trial the client and the jury are waiting for these objections and exceptions. The nature of an exception is a notice served on the judge that his rulings are wrong. The theory is that if he wants to change them he had better do so before the case goes to appeal. It is a covert threat to the judge. There is a principle in some courts that no ruling that is not excepted to can be considered on appeal; consequently a lawyer is careful to preserve his rights by exceptions.

A young lawyer once had this principle so firmly fixed in his mind that when he went to court he began taking exceptions to everything, even rulings in his favor. He would make an objection; the judge would

sustain it. "I except," said the lawyer. He would make a motion; the judge would grant it. "I except," said the young lawyer. The other side would make an objection; the judge would rule against them and in favor of the lawyer. "I except," said the lawyer. Finally the situation grew so strained that the judge called the young man to the bench and spoke to him confidentially. His explanation was: "This is my first case and the head of my firm told me to be sure and take exceptions to all rulings."

Some lawyers are so in the habit of excepting, it sounds as though they were hiccoughing. "Overruled"; "I except"; "Allowed"; "I except"; "Denied"; "I except"; "Granted"; "I except." It becomes a custom as constant as the refrain in a comic opera.

Theoretically it may have a sound basis under the law, but so little practical value has it that it seems ludicrous. The lawyers and the judges consider it a matter of course.

If the judge after all the argument finally decides to let the testimony as to the red cow stand, he will not be inclined to change his mind because the lawyer interjects that threatening exception. The sound of the word is spiteful and seems to express the resentment of the lawyer at the ruling of the judge.

No example could be found in the thousand volumes of law reports where the judge changes his mind on account of an exception. The object in this particular direction is vain.

With regard to appeal; the Appellate Court that attempts to decide a case on the exceptions taken at the trial would have a difficult time. They would have to disentangle the mesh of evidence and find out whether that important piece of testimony on page 204 was excepted to or not, then whether there was a proper ruling; refer to the stenographer's minutes and look at the important exception on page 59 and again on page 106. Unless the question decided was

excepted to, the Appellate Court can not decide it. It is hard to imagine that any court could be so rigorous and narrow-minded that they could hang justice on such little pegs of exceptions, which the stenographer in the hurry of the moment may have forgotten to insert.

In the criminal courts there are no exceptions on the part of the people, because there are no appeals on behalf of the State. The defendant continues to repeat "I respectfully except." "I must insist on my exception." Think of a man being jailed for seventeen years because his case was not reversed on account of the failure to except. The court could not believe Justice to be so blind-folded that she can not understand the evidence as a whole.

Exceptions are the tacks and pin pricks of a trial. They are of so little value in the main structure of the drama that if they are forgotten by either side, the court should provide them with a bushel basketful which could be distributed by the handful wherever

the lawyers thought they would be useful or pleasant.

Objections are of three main kinds: irrelevant, immaterial, and incompetent. They are like the magic words that open or unlock the doors of evidence and let it in or keep it out. They have three distinct meanings which lawyers understand. A thing may be immaterial, but not incompetent, or incompetent and not immaterial, or irrelevant and not immaterial, or irrelevant and not incompetent, or incompetent and not irrelevant, or one or both or not at all. Any student of law can fully explain the difference, but the distinction is immaterial and irrelevant, and if the reader is in doubt let him ask any lawyer friend to tell him in plain words, without insulting his common sense, what the distinction between immaterial and irrelevant is.

The confusion of one young man found expression finally in the terms "irreverent, impertinent, and—and—and—no—matter."

The lawyer, when he objects, usually at-

tempts a few other suggestions which may be considered by the judge, such as "the question is leading and suggestive; grossly improper; calling for a conclusion; objected to as argumentative or because of its ambiguity."

Whatever the trouble with objections may be, it is neither the fault of the lawyer, the judge, nor the witness. When certain evidence is not allowed by law it is proper that it be objected to. Unreasonable and often comical as objections sound, the basis of their existence in law is that the court wants the best possible proof.

Instead of a copy of a letter the judge and the jury ought to see the original. Instead of the copy of a will the paper actually signed by the testator is wanted. Suppose a question arises as to the payment of a bill. The defendant says that he went into the store and paid it. The best proof is to be given by someone who saw him pay it. A witness to whom he came afterward and said that he had been down to the store

and had paid the bill is not so accurate a witness as the man who was in the store and saw the money paid over. It is to keep out this poorer proof that objections are made.

If the objection is good, the judge says "Objection sustained," or if he thinks the evidence the best he allows it and says "Objection overruled," then the witness may proceed and answer the question. Unless the lawyer objecting states the ground or reasons for his objection, the objection is not supposed to be valid for the other side ought to be apprised of the reason so that he may supply the proper proof, that is why the objection is named as irrelevant, incompetent, and immaterial, so as to cover all possible grounds.

The reasons given tor the objections: incompetent, irrelevant, and immaterial might, so far as the average man is concerned, read "incontepent," "irrevelant," and "immature." The words when repeated together seem like that old legal term "incorporeal hereditaments." They are imposing and add

tone to the trial. The solemnity of repetition is always a valuable asset. The real value of the word irrelevant is shown by repeating irrelevant, "irrevelant," irrelevant, "irrevelant." In a short time one sounds as valuable as the other.

When he makes the objection the lawyer rises and when he is through sits down. This gives the appearance of constantly jumping up but is only a question of etiquette, like taking off the hat or making a bow. Some people like the formality but there is a question how much is due to the dignity of a court and how much form and manners must be sacrificed to efficiency of business. The judge who said that he did not hear the constant objections of the lawyer because he made his objections sitting down was not so much an adherent of good form as a protestor against the absurdity of professional objections.

The mooted question is the same and goes back to the one on evidence. Shall everything be allowed in and a photographic

picture of numerous details be given to the court? If that is the correct idea, a general knowledge and atmosphere may be derived from all the surrounding circumstances and then there would be no objections. If the strict interpretation of the law be followed limiting evidence to only what is seen and heard, objections are proper and sensible.

The modern tendency is to do away with all restrictions of the past. There has been too great severity in interpreting the law of proof and the pendulum is bound to swing far in the opposite direction. A medium may not easily be reached, and the only test is the common sense of the average.

On the question of time and whether the abolishing objections and letting in all evidence would not be shorter, there is much to be said. It might take less time for the witness to recount the death-bed scene of his wife's sister's brother-in-law's aunt, than for the court to hear and pass upon all the objections and arguments as to the admission of the testimony on the red cow.

As the jury listen to the objections and exceptions they become more and more impatient. The restraining influence of the surroundings, the fact that they are impaneled in a box and that they are a part of, the drama keeps them silent. They cannot break out in revolt at the badgering of the witness. They can say nothing about the absurd objections that are interrupting the proceedings or the spiteful little exceptions that are being thrown in, but can only quietly store up an increasing mistrust of the whole method. When the lawyer objects so strenuously the jury thinks he must have something to conceal. Yet when the objections are made they have a certain effect which is not at first realized. A question is asked that is to the juryman perfectly sensible, but which is absolutely inadmissable under the rules of evidence. For example, the lawyer asks, "What did you tell your wife about the accident when you got home?" Any reasonable man knows that what he tells his wife is very important and bears on the question

of his veracity. The other lawyer very properly objects. The jury thinks there must be something in it. The lawyer asks again, "Didn't you tell your wife the horses were going very fast?" The other lawyer is on his feet. "I object," he says, "and I must ask your Honor to instruct the counsel not to ask questions that are manifestly improper." The Court rules in favor of the objecting lawyer. He admonishes the lawyer and instructs the jury to disregard the question. Yet what is the effect? The jury believes unless the lawyer thought the answer would be most unfavorable to his side he would not have objected to it so strenuously. The impression remains on the minds of the jury that there was a good deal to that question of what he told his wife.

It is for this reason that when the lawyer keeps on asking objectionable questions, the judge will sometimes declare a mistrial or allow one side to withdraw a juror, which is only a polite way of saying that the present jury in the particular case can not be fair.

Here arises one of the prettiest dilemmas of the law on the trial of a case. Suppose the case has been going on all day or for several days. The plaintiff is very anxious to have it finished. He has been at great expense and trouble to get his witness and the lawyers' time is valued at so much per trial day. On the other hand the defendant at the worst can only have a judgment against him, which may as well happen at another time. He is willing to have the case declared a mistrial and start anew; he knows it will take a long time for the trial to come up again. It has been a dull grilling proceeding, but he does not care so long as there is a chance of postponing the judgment against him. It is on the whole better and easier to put it off.

Now if the judge declares a mistrial, on the motion of the plaintiff, that is his own look out. He believes that he can not have a fair trial, that he can not proceed. But suppose the defendant by his lawyer makes the trial unfair. His lawyer keeps asking

those improper questions which imply so much to the minds of the jury. The judge may speak severely to the lawyer and caution him not to keep on putting suggestive questions. That is all that he can do. It would be plainly unfair to order the withdrawal of a juror. The trial according to the opinion of the judge may be unfair. The plaintiff's counsel is afraid to ask for a mistrial, first on account of the trouble and expense to his client, and second, if it be denied, the jury will believe he thinks them unfair and does not want them to try the case. The judge is in a curious position with regard to objectionable questions and testimony, he ought not to penalize the plaintiff by punishing the defendant. The loosening of the laws of evidence might do away with quandaries such as these.

XII

THE MOVEMENTS IN COURT

XII

THE MOVEMENTS IN COURT

MOTIONS imply movement and action especially in a drama, but in a court motions are the reverse and occupy the place of dramatic pauses which delay the real movement of the play. They are of great interest to the lawyers, of some interest to the judge, because he has at once to pass upon them, of but little interest to the client, who does not understand them, and of no interest whatsoever to the jury, except when they result in the disposal of a trial.

Before the case begins the defendant makes a motion. When the plaintiff's lawyer has finished his opening, the other side makes a motion to dismiss the case. When he ends his evidence, the other lawyer moves to dismiss. When both sides are through,

each moves. When the jury bring in the verdict either side may move, or both when neither is satisfied. All through the trial there are quantities of little motions. Motions to strike out, motions to instruct, motions to make the witness answer a question, motions to make the other lawyer behave. Except for pointing the finger or raising the voice in talking, they are not movements, they are only verbal, the action comes in the play of emotions of the parties in court. Motions are merely saying what either side wants; the formal asking for something.

The first important motion is on the pleadings themselves or when the plaintiff has opened. If the judge does not believe that the plaintiff has stated a case in law, he dismisses it on a motion of the defendant and the judgment is "without prejudice." The trouble is that a judgment of this kind does not finally dispose of the dispute. The planitiff may bring the action over again.

He may appeal from the decision or judgment and the appellate court may rule that

the trial judge was wrong and then after an interval the case goes to a new trial just the same. By this time the plaintiff or his lawyer may believe he has no case and desists, but the course depends upon whether the parties have not died, grown tired, gone into the hands of a receiver, or moved to Borneo. The jury know little as to this state of affairs and are not interested in the preliminary motions. The clients do not understand but think the lawyers are good talkers.

The lawyers are interested in the point of law and believe so strongly in their case that if an adverse ruling comes they are shocked and surprised. The judge knows that although he grant the motion to dismiss, he will probably allow an amendment. He is not greatly concerned unless he foresees a possibility of settling the dispute definitely and going on to the next case. He is anxious to try the present action and get down to the meat of the matter but really if they are going to insist on all technicalities he feels a little impatient.

He knows that even if the defendant is right and the pleadings are defective because the stenographer forgot to insert a date, it can still be put in. Recent legislation has found it necessary to say that the courts should allow amendments of pleadings where "Substantial Justice" will be accomplished thereby. It is a commentary on the system of the courts that the people through its legislatures should find it necessary to pass a law that judges should amend paper pleadings in furtherance of justice. If justice and right depend upon pieces of paper to such an extent, the dry formalism of the courts is a matter of regret.

The next important motion is when the plaintiff has put in his evidence and has rested. "The plaintiff rests," the lawyer says.

The judge and the jury say to themselves, "Well it is half over."

The defendant's lawyer rises and says, "I move to dismiss on the ground that the plaintiff has not made out a cause of action. He has not shown that the cow was owned

by the defendant, or he has not shown that the driver of the plaintiff was free from contributory negligence, or he has not made out any kind of case at all."

This is an anxious moment for the young attorney. Did he forget something? What was there that he did not remember? Will the case be dismissed because he forgot to tie a shoe lace or put in a pin? If he is more experienced in court work he will not be so worried. The law is that the plaintiff must be given every chance at this stage of the proceeding. Only when both sides are through does the law begin to weigh the evidence. At the close of the plaintiff's case everything is in his favor. Any particle of testimony is sufficient on a particular point. The theory of the law is that both sides must be heard. If the motion to dismiss is made on the ground that something has been left out, the court will usually give an opportunity to prove to whom the red cow belonged. This motion like many other relics of a by-gone age, is a matter of custom

and tradition. It is usually made on the theory that the judge may think there is no case and that the plaintiff can not make out a case. If he so decides, the case is finished, the jury is discharged, and the client has his feelings hurt by being thrown out of court.

From a decision of this kind there is also a right of appeal which may result in a reversal. Then the new jury is impanelled, the witnesses are recalled, and the proceedings are gone over once more. If the decision or judgment is affirmed, the case does not usually come up again; the higher court has said the plaintiff has no case on the evidence, and unless new evidence is produced he can never recover. In certain accident cases the appellate courts have stated they would not give their reasons for dismissing the complaint after the evidence is all in because, they say, if they did so they were afraid the plaintiff would supply the missing links by manufactured evidence on the next trial and not quite honestly. This again is a commentary on procedure.

Just at this point is where the law of the case comes in so insistently. Before the case comes to court the lawyer is supposed to know whether his client has a right of action. Every state of facts or a breach of those rights does not give rise to an action that can be maintained in a court of law. If you ask a man to dinner and he accepts, but does not come, you can not recover your damages for providing the dinner; or if you fall down your own well, you can not sue the man who built it. The lawyer is supposed to have carefully considered what elements of fact make an action. If the facts themselves do not give him a right of recovery his case is dismissed; or if he has a cause of action but has not proven the facts, it is also dismissed.

But as was said above, if the train of facts or those in the pleading is imperfect, the modern spirit is to allow them to be made perfect. The only theory of law that is contrary to this spirit is what is known as the theory that every man is entitled to his

day in court and the day being had it is unfair to bring the other side in again on account of some defect or forgetfulness on the part of the other.

The reconciliation is that there should be no surprises on a trial, the modern tendency is to bring the case away from the idea of an ordeal by battle. The little advantages that are gained by sorties and surprises and which are usually taken advantage of by motion, are after all not of great moment.

An anomalous situation shows the absurdity of these motions, for when the plaintiff rests, unless the defendant makes a motion to dismiss the plaintiff's case, he is supposed to admit that the plaintiff has made a good *prima facie* case, and if he does not move he is forever after, on appeal or otherwise, prevented from claiming that the plaintiff did not make out a good case. The result is that at the close of the plaintiff's case the motion is usually made as a matter of form to preserve the defendant's right.

Usually this motion is denied if there is a possibility of making a case, but suppose the judge either through ignorance or to be obliging should say, "Well, the plaintiff has made out a good case, but if you ask it, the blood be upon your own shoulders, and I will dismiss the case." The defendant does not want it dismissed but he has asked for it and he has got what he asked for. The result is an anomalous situation. The case will undoubtedly be reversed and he will be mulcted in costs for being compelled to ask, because of the formalism of the court procedure, for what he did not want.

At the end of the defendant's case, when both sides have rested, the defendant again moves to dismiss. Here again it is a formal motion, which he may not altogether mean, but which the lawyer often makes as a matter of form. If the judge really believes there is not enough evidence to let the case go to the jury, he ought to say so without the necessity of a motion. Suppose there is not, he dismisses the case "on the merits"

and the trial is over. But suppose there is and the judge does not know his business and the fine point of law is not entirely clear to his Honor, and he makes a mistake and the case is dismissed. The result is that although he has granted the motion of the defendant to dismiss and given the defendant what he wanted, he has in reality penalized him, for the appellate court will reverse his decision and the defendant have to pay all costs and stand the expense of a new trial. The judge is in a quandary, which he may get out of in two ways. One is to let the weak case of the plaintiff go to the jury with the hope that they will see what a poor showing the plaintiff has made and find a verdict for the defendant, in which event he will be safe. But if the jury should make a mistake and find for the plaintiff, then the judge has the intention of setting that verdict aside, nullifying all the work of the jury, the witnesses, the clients, and the lawyers, and ordering a new trial. This is rather a weak-minded proceeding and shows

the necessity of having a man in the referee's chair who knows how to decide.

The second alternative for the judge is to reserve decision on the motion and to let the jury go into the jury-room and worry about the verdict for an hour or two, while the judge has the hidden intention of perhaps deciding that they need not spend any time at all about the matter.

The principle on which the judge passes on this motion to dismiss is, that after all the case is in and all proof had, that on the proof and evidence there is not enough on the part of the plaintiff from which any reasonable man could ever find a verdict for him. The motion differs from the one at the close of the plaintiff's case in that the latter is based on there being no proof at all, while the one after the case is entirely in is based on the theory that there is no possibility of a verdict.

This sounds again like a metaphysical discussion, but is illustrative of the futility of formal motions, so that actually the

decision depends upon the good plain common sense of the judge. The tendency is that if the case has gone to the length of a full trial and there is any question of fact involved, that the jury should determine the question of fact and exercise their functions. It must be a poor weak case of the plaintiff and evidently unsound, in which the judge or the appellate court interferes.

Throughout the trial the little motions that occur bear the same relation to the main issue as do the objections and exceptions.

"I tried to stop the car," says the motorman.

Up jumps the other lawyer. "I move to strike out as a conclusion."

The witnesses have testified to slightly different facts than what were stated in the pleadings. "I move to amend the pleadings to conform to the proof," says the lawyer.

"I move for an adjournment on the ground of surprise," says the other.

Of course the statement of the conductor

is a conclusion of fact. But if the other side wants to find out how he tried to stop the car, let him ask what was done. "Did he turn on the brake handle? Did he switch on the emergency?" A man does not have to be an expert to say that the car was going fast; he may be examined as to what he considers to be fast. Nor does he have to be an expert to say that eggs are rotten, that butter is rancid, that there has been a war in Europe, that a man has a broken leg or looks sick or acts queerly, that the fish is stale or the cow was red.

The motion to strike out does not affect the jury, the testimony still remains on the jurors' minds. The verbal memory stays. Neither does the motion to amend the pleadings affect the jury. What have they got to do with it? If the papers are amended it is not important from their standpoint. Should the plaintiff have written a letter that he was going to sue for something, to the jury that seems better than any pleading.

These motions are insignificant and ex-

amples of a formalism which, however valuable it may be as defining the methods of the legal battle, are not consistent with the modern spirit of investigation into facts. It is rather significant that the laws creating Public Service Commissions and Legislative Investigation Committees in some States go to the length of stating that there shall not be any rules of evidence such as are employed in the courts of law.

The other motions, such as to direct a verdict, which is usually the same as a motion to dismiss, and the motions after a verdict has been rendered, are also formal statements of a request for the disposition of the case.

They may be all very good and useful in their way, but are merely the incidents and measures by which the truth of the matter is reached. The client looks puzzled at the argument and the decision, the jurors have a not very clear conception of what is going on, the lawyers have a meretricious feeling that perhaps they are cheapening themselves

a little by making so many motions, yet they, nevertheless, have a legal right to do so and they must take advantage of every legal right for the protection of their clients.

After all the witnesses have been called, the plaintiff and the defendant have proved their sides, the plaintiff has contradicted the new evidence of the defendant, everybody has been examined, the interruptions of the objections and motions, exceptions have been had, the judge asks if both sides are through and the presentation of the case is ended.

The course of justice has been on a rough and rather narrow road. The popular revolt at the method of arriving at the truth is, in fact, at the narrowness of the way. The presentation of a case and the means of reaching the truth ought to be on a well-defined and orderly system. It would seem natural that the crooked and ill-paved streets of an old town should give place to the open, smooth, and broad avenues of the modern spirit.

XIII

ELOCUTION

XIII

ELOCUTION

AT last when both sides rest and the judge has passed on the latest motions, the intense action of the drama begins. For this the clients have been waiting, the lawyers have been training. It is the opportunity for them to display their attainments, to show their clients what brilliant lawyers they have retained; to let the judge know how well they have understood the case; to move and sway the jury to their side; to unravel the mysteries and by the power of oratory to bring justice where she belongs. When his lawyer is talking, the client watches him with admiration, but while the opposing lawyer speaks the client can hardly conceal his contempt. He feels that his case is secure and he does not understand how there can be anything to be

said on the other side. Yet he is fearful there may be some court trick which he does not understand and the case may be lost.

"Your Honor and gentlemen of the jury," begins the defendant's lawyer. Including the judge in his address, although it is a matter of courtesy for the eloquence of the summing up, is meant solely for the jury. The judge is only supposed to listen and restrain the attorneys if they go too far afield in their attempts to influence the jury by their efforts. The judge is the time keeper or referee and holds the lawyers to the point.

The object of the attack is the jury. As the burden of proving a case is on the plaintiff, he is supposed to have the first and the last word; therefore, the defendant begins to sum up. After he is through, it is the turn of the plaintiff. The tactical position is in favor of the plaintiff. The advantage, as in all verbal disputes, is reputedly with the man who has the last word. In all

debates the proponent has the right of opening and closing. The plaintiff began the case with his opening, and after it is over he is permitted to close.

"Gentlemen," says the judge, "how long will you take in your address?" Both sides agree upon a certain time, which usually proves too short, but which is acquiesced in with alacrity because each side thinks their case is so plain and convincing that it will not be difficult to explain. The lawyer girds up his loins, the court-room quiets, the struggle of conflicting evidence is over, the clients and witnesses retire from the foreground, the other counsel sits down and the lawyer steps close to the jury-box.

"The jury is yours," says the judge, as though he were abandoning the jury. Indeed the summing up is an attack, a vivid, keen, masterly struggle in which wit and brain is pitted against wit and brain: where facts and passions are to be marshalled in the most intelligent and plausible way, where imagination and oratory are to be employed

in their finest capacities. It may be bold, manly, energetic, or soft and persuasive; it may appeal to sympathy or threaten with a battery of accumulated facts. Forensic oratory is the highest type of art, the most powerful of human gifts. The only trouble with most court oratory is that it is only fit for the market-place. The lawyer begins with the firm impression that he must win the jury. His voice is bland and soothing, he feels that he must be soft and persuasive. He rubs his hands and remembering the old adage, that laugh and the world laughs with you, attempts a little joke. There is nothing so good as to get a smile for his side. Perhaps the joke does not go very well and the laugh does not come; the point has missed. He will try what flattery can do.

"Men of your intelligence can readily see," he says.

"When I was examining you," he explains in a subtle way. "I knew at once how unprejudiced and fair-minded you were."

"You gentlemen are practical men and can understand." Yet somehow the jury are impervious. They sit back in their chairs and stare.

Then the lawyer begins to forget the object of ingratiating himself. Hypnotized by the memory of his client's wrongs, he works himself into a frenzy of feeling. He swings his arms, pounds with his fist, raises his voice, and thunders his denunciation. His speech takes on a threatening tone. He shouts and bawls; the jury must be waked up. They sit stolid and unmoved. He tries to catch their eye, there is no gleam of interest. Perhaps he has rather a hopeless feeling that the art of oratory is not what it is reputed to be. The jury look particularly unresponsive. Even that one little juror, with the clever, smart face, who is leaning forward with such an expression of enjoyment may not be altogether trustworthy. The lawyer has seen that kind before and the one juror who seemed the most interested in the last case he argued

was the very one who held out against him in the jury-room as he found afterwards. It seems a difficult matter to stir the jury and the men in the box are not at all a warm or enthusiastic audience.

The jury are not particularly keen about the oratory of the lawyer, they look upon him as paid to do his part. It is the portion of the trial they can understand; they have not clearly comprehended what went before. When the objections were being made and there were the cross-examination and badgering of witnesses, they could not separate in their minds the functions of the lawyer and the personality of the lawyer. It seemed as though he were doing a good many unfair things and not acting quite up to the mark, but now the atmosphere has cleared. They can realize that he is only the paid talker for his client, that he is only making all this noise because that is his business. To the jury he is the pleader employed as an actor. The position is simple; if any one would pay them for acting and gesticulating at so

much per day or per hour, they would be very glad to earn the money.

The client watches the lawyer with affectionate admiration. True, he did not do exactly as he was wanted during the trial. He should have asked those questions he suggested, but now he is doing grandly. When the lawyer is through the client feels splendidly. He sees but one side of the case and believes in it absolutely. With such a good talker the jury cannot fail of being convinced.

When the lawyer sits down the client shakes him by the hand and tells him how well he has done. He might have been willing to settle the case for a thousand dollars before, but now he wouldn't pay a cent, not one cent. Later, should the jury find against him, even to the amount of the thousand dollars which he was willing to pay, he feels terribly disappointed. There must have been something very much amiss in the jury-room.

The judge while the summing up is going

on, is not very attentive. His part of the case is over. While the proof was being given he was alert. True, the charge is coming afterwards, but he knows fairly well what he is going to say, and it is going to be formal. It is the function of the judge to control the address of counsel, but the counsel are sometimes very hard to control.

In the criminal trials, reference is made to the emotions of the defendant's family; the devoted, anxious wife, the poor little children who may bear the stigma of their father's disgrace, should the verdict go against him. Since the domestic life of neither party to the trial has appeared in evidence, such things being entirely "irrelevant and immaterial," it does not make a great deal of difference whether the picture is accurate or wholly fanciful. The defendant may be a drunkard, a burden to his wife, and a horror to his children; he may have abandoned his family to their own resources; it is possible that he has never had any family at all. The lawyer has no right to refer in his summing

up, or otherwise, to anything that has not been properly submitted in evidence. He is guilty of unfair practice in telling the jury about the defendant's family or circumstances, unless this has been part of the case, which is improbable. He knows this well; so does his opponent and the judge. And should the opposing lawyer protest, the judge will say, looking up, "Be careful, counselor, be careful." The counselor bows respectfully and probably goes on in the same vein. The judge has not heard exactly what was said and feels that the lawyers, if they are not too blatant and noisy, may say what they please. There must not be too much talk about the wicked, money-grabbing, soulless corporation, not too much appeal for the down-trodden poor, nor an over indulgence in personalities. The lawyers must not call the other side liars and thieves too openly. That is, they may say they are untruthful, but liar is too strong. The denunciation must be a little restrained.

The judge throws out a rather mild ad-

monition. "The counsellor must keep to the evidence. You may not refer to matters which are not before the court." The lawyer says, "Yes, your Honor." The judge withdraws again into a contemplation of the high cost of living and his diminishing bank balance. The shouting and vociferation grow louder. The jury are long-suffering, but they cannot object. The other lawyer jumps up, and after an insistent effort makes himself heard. "The witness did not say that; you are stating something that is not so. I ask to have the stenographer read the minutes." The stenographer begins turning over the pages of his stenographic book. The exact testimony of the lady in the car is hard to find. "Heavens," think the jury, "are we going to have the whole case over again?"

The lawyer who is talking complains, "If my friend is going to keep on with his objections I shall never get through in my fifteen minutes." The stenographer has not been able to find the exact spot. It is apparently

not in the testimony. Then the lawyer objecting says, "I ask your Honor to instruct the jury to disregard the statement of counsel." The lawyer must have a sarcastic vein of humor. Such an instruction does not seem necessary. The judge says, "I will cover that in my charge, but I must ask the counsel to be careful," and he looks warningly at the clock.

Finally the hands point to the agreed time. The judge says, "Your time is up, counselor." "Just one minute more," says the lawyer and then he goes on for three. The judge raps on his desk. The lawyer winds up his speech in a hurried peroration. "Therefore, gentlemen, with the utmost confidence in your ability as men of experience and affairs, with the sure belief in the justness of my defense, I leave the matter in your hands."

The plaintiff's lawyer now takes the floor, the jury shift their feet and glance at the clock. "Gentlemen of the jury," he begins. He probably leaves out the judge. The

plaintiff now having the attack is more direct. It is rather significant of the change in all procedure that the language of all court addresses is becoming more and more simple. The old days when the lawyers delivered homilies of Latin have disappeared. No longer does the lawyer refer to *nunc pro tunc*, or make facetious jokes in a language the layman and probably the court does not understand. If a lawyer makes too many Latin quotations, the court thinks him affected. He must be simple, direct, and to the point at issue.

His art in presenting his case consists in drawing the picture of the facts so vividly that they will remain in the jurors' minds. Employing his imagination in forming the concept, he gets it across the rail to the jury by the fine gift of selecting words and incidents. No one, it is said, is ever convinced by argument, but any one can realize a visualized picture of words.

The counsel starts to storm and abuse his opponents and his opponents' client, and

in his wrath also forgetting that persuasion is not accomplished by denunciation. The majority of the jury are rather easy-going, kindly men, who do not care to hear others made too vile. Just as satire is more effective than direct abuse the tolerant juryman prefers to have the other party laughed at than called names.

The clients become worked up over their wrongs and excited by their lawyers' oratory. When the case is over they are extremely surprised to see the men who have been shaking their fists and ready to spring at one another's throats, quietly lock arms and go out to lunch together. It is all in the day's work and they must fortify themselves for the next trial. The shock is something like that when, after a melodrama, the heroine having jumped over the bridge and died in a whirlpool, comes out quietly and, in spite of her suffering, bows smilingly before the curtain.

The judge and the jury know that the lawyers are coming to life again and are

not really trying to kill each other. This is one of the pleasantest aspects of the life in court. There is a good fellowship between the two lawyers who have been so keenly struggling. They even have a kindly feeling toward the judge when he is off the bench.

The court attendant calls the attention of the lawyer to the time, who with a side-long look at the clock, also "Confidently leaves the case in your hands, gentlemen."

The two lawyers sit down and the judge puts on his spectacles, gathers up the notes he has been making of the main points of the trial, and turning to the jury begins his charge.

XIV

THE HEAVY CHARGE

XIV

THE HEAVY CHARGE

NO, madam, the charge of the judge does not mean his bill for expenses or his salary for trying the case. A charge implies something grave, heavy, and aggressive. It is what the judge tells the jury about the case. It is never light or humorous, but ponderous and hard to understand. The court-room doors are locked, no one must come in or go out during the charge.

The judge looks solemnly at the jury, the jury straighten up from the desponding attitude they gradually have assumed during the address of counsel.

The end is near and they begin to have hope. They appear interested and a gleam of awakened intelligence is in their eyes. Now at least they are going to hear what

they wanted to know about the case. The judge will probably tell them something new and clear up the points they did not understand. It may be even he will explain why he made those strange rulings during the trial and what that mysterious conference was when he called the lawyers to his desk and they talked together for so long.

The judge begins: "Gentlemen of the jury, the plaintiff in this case seeks to recover," and then he goes on to tell them what the plaintiff wants, which is just what the plaintiff's lawyer has been telling them. The judge must have been asleep while he was talking for he is saying the same thing over again, only in a little different language. After that the defendant's case is set forth. There again that is what the defendant's lawyer was saying. It does not appear reasonable that they are compelled to hear six times what the case is about. There were the two openings of counsel at the beginning, the two summing up at the end, and now the two explanations of the judge.

There ought to be an allowance made for the jury possessing a little intelligence.

The judge then tells again what the witnesses have said, in not quite so many words, but covering the main points. There is no use in that. The jurymen think they ought to remember fairly well what was said. The judge admits it after he is through by saying himself: "Gentlemen, you are to be governed by your own recollection of the testimony rather than by what is said by either side in summing up or by the Court." If he means that he should have kept still and let them have their own recollection.

Then he goes on: "If you believe any witness has wilfully testified falsely as to a material fact, you may disregard that witness's whole testimony." Of course, is that not the reason for their being there? Why, the judge in the beginning made them swear to decide the case "according to the evidence." The jury is going to do exactly that. They are going to decide which side is lying and which side is telling the truth.

They are not quite so stupid as not to know that. There seems no need in insulting them by telling them that they need not believe a witness unless they want to. Why are they there?

The judge tells them that the function of the jury is to decide the facts and for him to decide the law. That is fortunate, for they could not understand the law, even if they wanted to; it is a silly business and it is not common sense. What the jury feels is that the judge's charge is leaving it to them without any trouble about the law. But wait a moment, the judge is going on to tell them about the law as applied to the particular facts before them.

The important principle of law they are being told is what is known as the preponderance of evidence and the burden of proof. The judge goes on at great length about the weight of evidence. The weight of evidence, he says, is the preponderance of proof and the preponderance of evidence is the weight of evidence, and the man who has

the burden of proof must have the weight of evidence and the weight of evidence being the preponderance of evidence is also upon the man who has the burden of proof. And the preponderance of evidence does not mean proof beyond a reasonable doubt, as in criminal actions, but that the proof must be heavier on one side than the other and the one who has the burden of proof must sustain the preponderance of evidence. That is the law; the judge has said it. What it means the jury give up. The lawyers nod their heads wisely. The judge has stated the law correctly.

The judge may go on a little further and tell them more about the burden of proof and the preponderance of evidence. He may say that the weight of evidence does not mean the number of witnesses. The mere fact that one side has six and the other side only two does not mean that the jury are to believe the side who has six. The jury know that when probably they are all exaggerating somewhat they are going to

decide the way the thing happened. Then the judge tells them, having seen the witnesses, "That they may consider their bearing on the stand and their manner of giving testimony." Surely they are going to do that. Is not the best way of knowing whether a man is telling the truth to look at him and watch him while he is talking? There is little sense in the judge advising them to consider his bearing on the stand.

Another thing the judge says is that they are not to be governed by sympathy or prejudice in arriving at their verdict. This is a caution that the judge thinks necessary. He forgets that when they are in the jury-room, with locked doors and no one to disturb them, they are going to do exactly as they are inclined. Prejudice and sympathy are for unintelligent people who do not know what they are about. Both lawyers have been telling the jury what intelligent men they were and it seems unnecessary for the judge to say that they are not to be governed by prejudice and

sympathy. Suppose the defendant is a rich corporation, they are not going to find against it because it is rich. The company can stand the loss of a few dollars out of its pocket better than the poor man anyway. Not that they are going to decide for that reason.

As these accumulating evidences of the judge's misunderstanding of their attitude of mind pile up, the jury sink back into their seats. After all, the charge of the judge is not more understandable than most of the other parts of the trial. The saving point about it is that the end is drawing near and they can soon get away and have a smoke in the jury-room, and afterwards go home.

The judge, while he is charging, understands a little of what has been going on in the jury's mind. He has seen the gleam of interest which was in the jury's eyes at the beginning gradually die out. He notices how they fall into resigned attitudes. He has a glimmering that the good old legal aphorisms which he has been enunciating

with such care about the burden of proof, the weight of evidence, the credibility of witnesses and the caution about sympathy and prejudice, are not very convincing to the jury. But the conventions require that he must go on.

"Gentlemen," he says, "I must instruct you to eliminate from your minds any discussion of counsel upon questions of law or rulings of the court upon the rejections of testimony, or decisions upon motions to dismiss or direct. They involve matters of law with which you are not at present concerned. In arriving at your verdict you are to consider only the evidence."

Perhaps the judge feels a trifle foolish and therefore he becomes more emphatic and solemn. He carefully and in a painstaking manner defines the law of negligence. He tells them the law of negligence involves two cardinal principles. "The first is that the plaintiff must establish that the defendant by its employees was guilty of negligence, that he failed to act as a prudent

and careful man; second, that the plaintiff must have shown himself free from contributory negligence; that unless the jury find both of these, that the plaintiff cannot recover." Then perhaps he interjects a little more about the balance of proof as to these particulars. "If the jury find the plaintiff was negligent and the defendant was negligent, they must find a verdict for the defendant. If they find the plaintiff was not negligent and the defendant was negligent, then they may find a verdict for the plaintiff, provided they find, etc., etc. Otherwise should they find the plaintiff was not negligent and the accident happened not through the negligence of the defendant, then again must they find for the defendant, or again—" but the jury by this time is exhausted. The alternatives do not interest them. The judge may know what he is talking about, but they do not. The interesting question is how much are they going to give the plaintiff.

The judge finally becomes worn out, a

kind of self-hypnosis sets in. He remembers so many phrases and legal maxims that he might enunciate, his brain becomes confused as to selection. There are volumes of charges to juries which he has more or less learned by heart. There are so many glittering and vague generalities about the law of negligence, the law of contracts, the law of evidence, the burden of proof, or the weight of testimony, that he could go on indefinitely. The jury have ceased to understand and the judge realizing the hopelessness of this situation, winds up by saying—"So, gentlemen, bearing in mind what I have just told you and the evidence in the case, you will retire and consider your verdict."

The jury begin to gather their hats and coats, when up jumps one of the lawyers and says: "One moment, please. I ask your Honor to charge that if the jury find the cow that was in the plaintiff's garden was a white cow and not a red cow, then their verdict must be for the defendant." "I so charge," says the judge. "I except," says

the other lawyer, "and I ask your Honor to charge the jury that if they believe the cow was the property of the defendant, their verdict must be for the plaintiff." "I refuse to charge in those words," says the judge, "there may not have been any cow or he may not have eaten the cabbages." Or the lawyer for the railway may ask the judge, "That if the jury find that the driver was forty feet away from the tracks and the car was a hundred feet away from the corner of Seventy-eighth Street when he first saw the car, and the car was going at a rapid rate and the conductor pulled the bell and the driver was sitting on the right-hand side of the wagon and might have seen the car had the car been one hundred feet below the corner, then in that event I ask your Honor to instruct the jury that the plaintiff was guilty of contributory negligence and cannot recover."

The question is undoubtedly a poser. The judge is evidently worried; if he make a wrong guess and says "yes" or "no" at this

juncture, the appellate court may say: "Error, judgment reversed, new trial ordered." What happens is that the judge takes a chance. The lawyer says, "I refer you to 169 New York Court of Appeals Reports, page 492; in the case of Jones *vs.* Metropolitan, the court there said that the refusal to so charge was reversible error." The judge looks wise and finally says, "yes." There is a little playing of politics in this; he has possibly been thinking how the jury are going to decide and realizing that what he charges won't make any difference, he plays safe by charging what the losing side wants.

These requests to charge may go back and forth indefinitely with rulings and exceptions. Either lawyer may except to a portion of the judge's charge, thus serving notice upon him that unless he hurry up and change it he may be reversed on appeal. That is the reason why the charge of the judge has not a great effect. He has to be too careful.

In New York State the judge can not say

what he thinks about the case. In other words, the charge must be indefinite. In England and the Federal courts in this country, the judge may legally express his opinion as to how the case should be decided, but that is as far as he can go. The distinction is a relic of the old days of the jury system when the judges would imprison the jury until they found as was wanted. Now the judge may only express a preference and the jury may do as they please. In some courts the democratic idea of the independence of the juryman goes to the extent of not allowing the judge to say anything specific.

The result is that the jury are confused. They are usually of so independent a nature that the judge's charge would not greatly influence them. The clients sit by utterly confounded; they hear the judge wisely say, "I think perhaps yes, but on the whole it may be no," and when he is through, not understanding as much as the jury, they think the judge's charge is very fair. Having said little of import it probably is.

The continental method is so entirely different, that it is shocking. In the courts in France the judge practically says for his charge, "You've heard the evidence, now go on out and do what's right." This again illustrates the difference between the old and the new ideas of courts. The old is a battle ground where the issues are defined, the courts are kept within narrow limits and the rules of the ordeal observed strictly, and the modern, merely an investigation of a dispute with the glamor of a contest left out. It is an investigation of facts, which however bitter may be the personal animosity, should never lose sight of the main idea of arriving at the plain truth, in a common sense way.

At last the lawyers are silent, the trial is over, the judge patiently asks are there any more requests to charge, and there being no more, he turns to the jury and says, "Gentlemen, you will retire and consider your verdict." Slowly they file out, conducted by the court attendant, to the jury-room.

XV

THE TRUE VERDICT

XV

THE TRUE VERDICT

THE truth is said. The battle is over and the mighty have prevailed. The decision is made. Justice divine and compelling is about to pronounce its sentence. The truth seeks to burst forth and the jurymen have knocked at the door of the room in which they have been locked for so many hours. The court attendant, who has been standing like a sentinel outside to prevent the approach of eavesdroppers and listeners, turns the key and sticks his head into the room, withdraws, locks the door again, and sends off for the judge.

The judge has been in his chambers taking a rest and enjoying a cigar. The judge always, when he is off the bench, is by courtesy said to be in chambers—other

people might call it a room with an office desk, but the dignity surrounding a judge invests even the bare office room where he sits. It is named in the plural, even if it is only one ordinary room. He throws away his cigar. The lawyers or their assistants who have been lounging about the empty court-room, gossiping with one another and trying to evade the importunities of their clients, who insist upon speculating with them on the probable result, have been summoned to the bar. The judge takes his seat on the bench. The jury, marshalled by the court officer, file in. They are lined up in the jury-box.

"Gentlemen," says the judge, "have you agreed upon a verdict?" "We have," answers the foreman of the jury.

When the jury have first been locked in the jury-room they have probably immediately relaxed after the long strain of the trial. They were entitled to a smoke and to feel at their ease. Besides they know that if they finished their deliberations too early,

they will be called on another case. It was nearly two when the judge finished his charge, so they have plenty of time to waste; for if they came back to the court-room before three they would be impaneled in another trial.

They have taken a straw vote to find out how the sentiment stood, not with the hope of arriving at a decision but by way of trying out the matter. The result stands nine for the plaintiff and three for the defendant. They light their cigars, for they came well prepared for the tedious hours in the jury-room.

The nine men look at the other three in disgust, the three look at the nine with contempt and then they begin to argue. The deliberations of the jury are always secret, their method of procedure is uncertain, and only the result of their deliberations appears in court. Nevertheless, it is only reasonable to speculate on how they have arrived at their verdict. Their verdict is the climax of the drama, the goal of the

race, the award of victory. One side must win and the other be defeated. The psychology of the jury in reaching the verdict is the great mystery and the most intense interest of the trial. The judge does not know, the lawyers are unable to understand. There is a certain respect for the inviolate privacy of a jury-room. If trial lawyers could understand the method by which they arrive at their final announcement they would be far better equipped than by a study of the law for many years.

It is a question whether or not their actions are different from those of ordinary men outside a court-room. They have left the restraining influence of an uncomfortable and conspicuous position and have entered again into the attitude of mind of the every-day world. The control of the judge has disappeared. The lawyers are only memories. They have become only plain business men with something definite to do. They do not know how to do it and the discussion begins in a desultory way.

"Well, we ought to give that boy something."

"I don't like the looks of that last witness."

"That lawyer for the defendant was too smart."

"But do you think the driver tried to cut him off?"

"He couldn't have been in bed six weeks."

"No man would stay in bed that long with a sore knee."

"Oh, well, he only meant he was about the house."

"That doctor was a great one. He loved to get off those terms; he must be just graduated from the hospital."

"Did you hear the lawyer say in a case he tried in Brooklyn he had seventeen of those experts?"

"Well, let's take another vote and see if we can't get together."

"I can't stay here all day. I've got to close something important at four o'clock."

"You'll stay here if you have to; we want to get this settled right."

Another vote is taken. The result is the same and the two sides gradually assume opposing positions. Each one takes a leader and spokesman; the discussion is probably between those two and an occasional interjection by the others. By this time the argument has grown tense and after half an hour the original arguments of counsel, the evidence, the instructions of the judge have become merged in the minds of the jury with what has been talked of in the jury room. The recollection of each juror includes the recollection of the discussion that they are having. The mental picture is now a combination of what each witness thought, each lawyer conceived it, how the judge described it, what they imagined it during the trial, and added to the mental concept is the recent present struggle between twelve points of view.

They do not remember what it was the judge told them about their verdict. Sup-

pose they send out and ask him. No, they do not want to appear like fools. It is plain. Their verdict must be for the plaintiff or the defendant. But in that contract case where the other side wanted something back from the plaintiff, how are they going to find a verdict for both? They can't find a verdict both ways. They had better send out and ask the judge. No. Well then they will send for the pleadings, they will show.

"What," says one juryman, "do you think those pleadings would show anything a reasonable man could understand?"

They decide that there was a bill that told the story. They knock on the door. The court attendant opens it. They explain, he gathers in the lawyers, and they go to the judge's desk. There is a thrill. The jury have agreed so quickly it must mean a verdict for the plaintiff. If they had been out longer it would have meant there was a disagreement or a verdict for the defendant. The longer the jury stays out the better for

the defendant thinks the lawyer. But the actions of the jury are uncertain and there may be no rule of arriving at their decision.

There is the story of the judge who, after the jury had been out for a long time, made a bet with the stenographer as to how the jury were going to decide. The judge thought himself an expert in determining the probable verdicts of the jury. After they came in and announced their decision and were discharged, the judge having lost looked crestfallen. The stenographer smiled. Then the judge recovered himself.

"You win," he said, "but the next time you and I bet on a decision it is going to be one of our cases without a jury."

The attendant asks for the bill and returns to the jury-room. The court falls into a lethargy of waiting. The jury, having their information, go on with the discussion, probably on the following lines.

"Sure, I told you the silks were worth four hundred dollars."

"Well, I know those kind of people; they

are small people and they never did that amount of business in all their lives, let alone one month." Or,

"Don't you know that neighborhood; all the cars speed up whenever they get there."

"Why, yesterday I was getting off a car and the conductor pulls the bell, etc., etc."

"No, I ain't prejudiced against the railroad; I ain't got nothing against the railroad."

"Of course, we ain't going to decide this case on sympathy or prejudice. But that boy's Irish and he looks like he come of good honest people."

"Vy, I don't see no difference whether he is Irish—or Yiddish; vot ve vant is justice."

"Now see here, my friend, if you think you're going to make this a racial matter you're mistaken. Just because that boy's Irish you needn't think he ought not to get nothing. You're prejudiced, that's what you are."

"Oh, let's get down to the evidence anyway; what we want is to decide."

"Vel, the motorman vas Irish, vot you talking about?"

"Sure, but he had to say what he did. Didn't he have to hold down his job with the company?"

The rest of the jury sink back resigned and despondent. They will never get out. One of them ventures.

"The judge told us that the law was——"

He is interrupted.

"Oh, we don't care so much about the law. What we want to do is to do what is right."

Somewhere, somehow, and by non-understandable methods the verdict is reached. If the jury ask for further instructions, they file back into the court-room and the judge proceeds to elucidate the hidden mystery of the law in much the same manner he did in his charge. They return again not satisfied. and take up the discussion.

The most dramatic moment in the trial is when the officer comes in and announces the jury have agreed. While they slowly

file in, the prisoner or the parties watch them with soul-tearing eyes; the lawyers with anxious expectancy. There is an electric thrill in the air. In some mysterious manner their verdict becomes known before the foreman speaks. Call it thought transference, mind reading, or what you will, there is a quick understanding from their faces, their manner of walking in, and their final pronouncement is only a confirmation of what was expected.

The jury has spoken, the lawyer who has lost moves to set aside the verdict. The jury looks startled. Is it possible that after all that trial and all that deliberation the judge is going to upset it again and have the long trouble gone over. The judge denies the motion or takes it under advisement. Only on rare occasions does he set the verdict aside then and there. The verdict must have been outrageous, absurd, clearly a compromise, or absolutely and shockingly against common sense. The theory of the law is that the verdict of a jury is a final

judgment on the facts by the best judges of the facts. It will not lightly or for small reasons be interfered with.

The question of belief in the jury system is one of the most futile of all large questions. In the first place, jury trial is so deeply engraved in the constitutional bill of rights that one might as well ask: "Do you believe in citizenship?" "Do you believe in the United States of America?" Secondly, trial by jury is so completely involved in the present system of court trial and procedure, that they are inseparable. The evils of the whole attach to the part and the beneficent aspect of the courts pertain equally to jury trials.

Coming down to a concrete case and leaving the abstract principle to the theorist, there are certain obvious things to be said for and against jury trial. The jury represents the opinion of the common or ordinary man—the *vox populi*. Twelve men picked at random are probably neither all capitalists nor all laborers. They are made

up of a few of both, but the majority, if not all, are the small tradesmen or the great middle class. These men are not ignorant, prejudiced, or unintelligent. They have a limited experience, but their judgment is the judgment of mediocrity and mediocrity is what is wanted. The professional man, the expert, the specialist is needed for the special degree of administration, but for the determination of the actual right and justice, what is needed is the instinct of the ordinary man,—the plain ordinary common sense.

When the criminal says: "I stand a better chance with a jury"; when the civilian says: "If I had the wrong end of the stick give me a jury," he is appealing not to the wrong side of the jury system, but to a quality which is not always recognized.

Law is an exact, definite statement of principles, absolute and apparently immutable. When a man on the street walks up to another and wantonly insults him, the law is, that the insulted party must turn

and walk away. If the matter came before a jury they would never convict him for knocking the other down at once. The jury system is the mitigation of the law.

XVI

LOOKING BACKWARD

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Extracts from the Graduation Dissertation of a Columbia J. E. upon receiving his degree of Juridical Expert in 1947.

HISTORICAL investigation of obsolete customs is of little value beyond preserving some record of what may soon be forgotten.

In the year 1947 it seems almost unbelievable that the universal use by the public of Judicial Corporations should have been a matter of such recent economic growth. It is interesting to trace their development and the social causes from which they sprang.

The efficient administration of these co-operative Corporations being demonstrated

by their financial success, makes it unnecessary to dwell upon the details of their intensely developed organization. Existing as they do upon so broad a comprehension of the whole commercial and social structures, it is little wonder that they have proven their value to the community. Their highly specialized departments of Issues, Investigation, Statutory Law, Records, Determination and Results correspond in a measure to the former method of procedure in the extinct courts of law and equity. Times have indeed changed

The analogy between the present methods and the antiquated and conventionalized customs of those cumbersome and inadequate institutions is not difficult to find. The department of Issues, for example, corresponds to what was known as the pleadings in an action. These were formerly bits of paper governed as to form by inflexible rules, instead of the efficient method by which under the trained managers of able minds the matters in dispute, either of fact

or law, are now narrowed down to exact points of difference. Naturally the methods of their managers being untrammelled by outside rules and they being men of wide experience and tact, the work of this department is not as difficult as at the first commencement of Judicial Corporations was anticipated.

The departments of Investigation and Experts correspond with the former division of court trials known as evidence and testimony. Any explanation would be futile of this branch of a forgotten formalism. The ancient rules of evidence and court procedure could only be understood by contemporaries and an extensive research has failed to disclose very clear concepts even by them. The modern methods of the departments governing the ascertainment of facts, either through the experience of the departmental employees or the efficient work of trained investigators, have naturally been much aided by the invention of the Viviphone making all communication adequate and easy.

The departments of Statutory Law and Records even yet retain certain characteristics of a period when judicial officers and clerks represented to the public mind the embodiment of what was known as "Red Tape," a true colloquialism descriptive of the attitude of official conservatism. These departments being governed according to the latest bibliographical methods are of merely supplemental value as reference. The Simplification and National Unification of Federal and State statutes has, of course, added greatly to the facility of this branch of the business.

The Determination and Result departments at first were thought to be of primary importance. Corresponding as they did in their functions to the former exclusively judicial qualities of the courts and the final judgments thereof, the exaggerated import previously given to those functions presupposed an equal necessity in this subdivision of the management of the corporation. This proved to be incorrect. It was found

that after a careful framing and narrowing of the matter in dispute by the Issues department, and a thorough and careful sifting of facts by the Expert and Investigation departments, the dispute gradually, if not wholly, disappeared. Men of the highest character and calibre being employed at large salaries as heads of these departments, have given adequate satisfaction, as has been proved by the prosperity of the Corporations. The recompense of the heads of these various departments, requiring as it does men of the greatest commercial understanding, is said to be in some instances fabulous.

In the early quarter of the present century and indeed in the latter part of the nineteenth, the undercurrents of many movements were already stirring the surface of the placid stream in which for so many centuries had been flowing the course of justice. Those curious relics of a medieval, age, the law courts, still at so recent a date, retained many of the forms, characteristics,

and usages of a time when knights fought in plate armor and indulged in the mimicry of battle, urged on by the glamor of chivalry. The very terms and the legal phraseology of the period implied the jousts, tournaments, and ordeal by battle of a romantic and self-deceptive age.

The universal world war that resulted in such an immense change of social and economic values contributed naturally to the destruction and abandonment of old forms and structures. Yet even before the war and the economic revolution that followed so quickly thereafter, the tendencies toward a more sane treatment of the question had already begun.

Like the extinct class of so-called physicians and doctors, who have now been amalgamated by the Public and Private Health Corporations, what was known as the legal profession or men known as lawyers and judges, had been gradually losing their characteristics as a class and had been step by step merging into men of business.

One of the earliest changes was the disappearance of the lawyers known as the real estate lawyer. Up to about 1890 there still remained members of the legal profession who made a livelihood out of the examination of the titles to real property. The obvious advantages of a comprehensive title examination plant by large corporations known as Title Insurance companies soon eliminated this particular subdivision.

The next important change arrived in a curious manner under the cry for what was then known as Social Justice—a vague term which was then advocated by many so-called "reformers" and ignorantly opposed by the capitalist class, without any very clear understanding of what was meant. So little was realized of the economic and efficiency values of insurance against chance, that the beginning of the movement was opposed. The movement resulted in certain obvious changes which looking back upon them seemed inevitable and natural. This was what was known as universal Employers'

Liability laws. The principle soon extending itself to all classes of accidents, resulted in the passage of legislation which had been foreshadowed by the tremendous growth of Casualty and Accident Insurance companies. Beginning at first with laws holding the employer liable for accident, and afterward resulting in the insurance of labor, it was gradually extended to accidents of every nature, including injury from travel on common carriers and the ordinary vicissitudes of life.

The result of State insurance against negligence and injuries of every kind was that all claims for injuries were adjusted by the State and the lawyers who lived by pursuing the neglect or misfortunes of others, gradually became extinct. A certain distinguished and conspicuous type was known by the term "ambulance chasers"—the exact derivation of the term not being now, in 1947, entirely clear but probably being related to some antiquated legal custom of succoring the wounded—very soon disappeared.

The cases that arose from all commercial disputes became less numerous as the more candid and intelligent dealings of the economic world awoke better and more honest business standards. But long before the disappearance of what was known as the commercial lawyer, there are evidences that the former courts of law, even before their entire abandonment, had fallen into a partial desuetude. Apparently disputes of large magnitude never reached the courts. And the legal standards enunciated by the courts were so entirely unrelated to the standards on which the actual commerce of the world was conducted, that resort was but little had to the arbitrament of the law of procedure in court.

The entire change of personal and domestic relations and the greater freedom from the institutionalism of semi-civilized communities, *e.g.*, the abandonment of all restriction on divorce, naturally did away with the class of litigation that appeared in certain courts of law dealing with marital or personal grievances.

In regard to what were known as criminal lawyers and criminal courts, the different attitude which the public formerly had toward unfortunate sufferers makes the existence of such a class or such institutions almost unbelievable. As it is now inconceivable that we should throw into unsanitary jails men and women who are mentally or socially diseased, so is it hard to realize that during the unintelligent period of which we are speaking, nay for many centuries, there existed people who lived upon their misfortunes.

Naturally with the disappearance of litigation and lawyers the public no longer tolerated the existence of the judges or courts. For a few years they retained a hold upon the imagination of a small portion of citizens who entertained a sentimental regard for the State institutions of a civilization founded upon the unsound teachings of eighteenth-century doctrinaires.

The period of the abandonment of the old courts corresponded with the extraordinary

development for what was called "moving pictures"; those pale, lifeless presentations without color, speech, or substance, at which the people of a benighted age gathered for amusement or entertainment! It requires imagination to conceive that people were unfamiliar with the ease of communicating with any place on the globe and reproducing exactly in form, color, and speech by turning on a switch. The observer of that age must have been shocked and surprised to find the solemn courthouses turned into what was known as moving-picture palaces or as community centers for dancing and social entertainments.

The change of class which the lawyers had gradually been undergoing to simple men of affairs was not so abrupt as that for the judicial officers, who were far removed from actual life. Various expedients were attempted by which they could be preserved as a class. Their former occupation being gone and the idea of pensioning not being satisfactory, as there remained a large

number of younger men on the bench who might be of some value to the community, a system of court cafés was evolved. Even to-day it is fast disappearing and for the benefit of future generations it may be well to describe the last remnant of an institution that held its position in the social order for so long.

Human nature being always substantially the same, it was thought that its demands for the dramatic action and stress of battle should have some outlet. It was not thought wise to entirely abolish the arenas for legal disputes, although the present Judicial Corporations with their excellently organized departments were already rapidly destroying all litigation. It was felt that perhaps humanity demanded the bringing together of the two disputants so that they personally might oppose their claims to one another.

It now seems incredible, in view of the absolute simplicity of communication by Viviphone, that this should be thought necessary. The need for romantic expression

seemed to demand the opportunity for personal presentment. The social workers who established these café courts, did not realize that with the growth of a more intelligent public point of view, the question of abstract justice was little more than an application of customs and social standards to particular facts; and that with the fall of the ideas of justice in the abstract, there also fell the appurtenances of justice.

It may here be noted that the learned treatise of Professor Humperdinck upon the recent discovery of certain statutes found among the ruins of the Great New York Explosion is mistaken. The figure which he described among others of the woman blindfolded and with an arm extended as though holding something, does not represent as he calls it, "The poor blind girl begging," but a figure of the Goddess of Justice holding the scales, who was so long worshiped.

The growth of the court cafés was made possible by the amelioration in the climate of New England effected through the altera-

tion in the course of the Gulf Stream. The inhabitants became accustomed to spend more time in the open air so that the courts became popular. Existing as places for the display of eccentricities and the airing of personal grievances, they soon became extremely frequented as places of amusement.

Whenever any litigant felt that there was any matter in dispute which needed adjustment by some outside agency, he invited the other party to come to the court. The judges occupied the position of proprietors, *maîtres d'hôtel*, and waiters, whose business it was to make the courts as attractive as possible. As their salaries depended upon the amount of receipts and the courts were run upon a partnership basis in which all shared the profits, the aim of the judges was to draw as large amount of custom as possible.

The surroundings were in every way desirable. In the open air, under spreading trees with the sunlight filtering through the leaves upon the well-kept lawns, were spread

tables covered with delicious fruits and every delicacy that the human mind could devise in the way of culinary delights. Rare wines, exotic flowers were constantly supplied in profuse display. Luxurious divans and reposeful seats were interspersed about. The most modern as well as the most famous musicians furnished exquisite music, while flitting about in neat white aprons partially concealed by their gently swishing gowns of black, the attentive justices anxiously tried to add to the pleasure and comfort of their customers.

With such temptations as these there was little wonder that the opposing party accepted the invitation to attend court. Witnesses and spectators crowded about, both on account of the novelty of the institution and the opportunity for refreshment and amusement. The aim of the judges was to incite the disputants to continue their disputes instead of trying to pacify them.

The more vociferous they grew, the more noisy and passionate they became, the better the crowds were held who came to

observe the performance. It was upon this clientele and the sale to them of viands and comestibles during the dispute that the profits of the judges depended. So long as there was a serious and energetic struggle the spectators remained at the adjacent tables and trade was brisk. Whenever, however, the litigants came to a full realization of the absurdity of their position, either by the continued laughter of the spectators at the public airing of their private wrongs with which the public had nothing to do, or becoming tired of mere words and came to diminish the ardor of their combat, the crowd would begin to dwindle away. The judges quick to understand the loss of trade after vainly trying to induce the litigants to new efforts, would gently and suggestively push under their hands a pair of dice boxes or a pack of cards and the dispute would sometimes end upon the throw of a die or the turn of a card.

The reason that these court cafés have not long remained in vogue, was that all actual

litigants soon became so sophisticated as they realized the enormity of the position and how unreasonable their conduct seemed to the average man. Public sentiment was naturally against such a waste of time and real performers became scarce. Several of the courts were detected in hiring false litigants as actors so as to draw the crowds. The performance not being genuine soon lost its interest. The patrons left them and many courts became bankrupt. So like their predecessors, those light-minded courts have practically ended.

THE END

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